DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 08-998

Title: Jan Hamilton, Chapter 13 Trustee, Petitioner
v.
Stephanie Kay Lanning

Docketed: February 5, 2009

Lower Ct: United States Court of Appeals for the Tenth Circuit

Case Nos.: (08-3009)

Decision Date: November 13, 2008

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 3 2009	Petition for a writ of certiorari filed. (Response due March 9, 2009)
Feb 3 2009	Supplemental appendix of Jan Hamilton, Chapter 13 Trustee filed.
Mar 25 2009	DISTRIBUTED for Conference of April 17, 2009.
Apr 2 2009	Response Requested . (Due May 4, 2009)
May 19 2009	Letter of April 20, 2009, from counsel for Stephanie Kay Lanning received.
May 26 2009	DISTRIBUTED for Conference of June 11, 2009.
Jun 15 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Sep 29 2009	Brief amicus curiae of United States filed.
Oct 14 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	Petition GRANTED limited to the following question: Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.
Dec 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 21, 2009.
Dec 10 2009	The time within which to file respondent's brief on the merits is extended to and including January 22, 2010.
Dec 21 2009	Joint appendix filed. (Statement of costs filed)
Dec 21 2009	Brief of petitioner Jan Hamilton, Chapter 13 Trustee filed.
Dec 28 2009	Brief amicus curiae of National Association of Consumer Bankruptcy Attorneys in support of neither party filed.
Jan 4 2010	SET FOR ARGUMENT ON Monday, March 22, 2010.
Jan 12 2010	The time within which to file respondent's brief on the merits is further extended to and including January 27, 2010.

Jan 27 2010	Brief of respondent Stephanie Kay Lanning filed.
Jan 28 2010	Brief amicus curiae of Professor Ned W. Waxman filed.
Feb 3 2010	Brief amicus curiae of United States filed.
Feb 3 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 5 2010	Record received from U.S.Bankrutcy Appellate Panel of for Tenth Circuit. (1 envelope)
Feb 22 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 23 2010	CIRCULATED.
Feb 26 2010	Reply of petitioner Jan Hamilton, Chapter 13 Trustee filed. (Distributed)
Mar 22 2010	Argued. For petitioner: Jan Hamilton, Topeka, Kan. For respondent: Thomas C. Goldstein, Washington, D. C.; and Sarah Harrington, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. _____ 08 998 FEB 3 - 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 eliminate judicial discretion by requiring an above-median income debtor to pay to unsecured creditors the net result reported on Official Form 22C?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Jan Hamilton, Chapter 13 Trustee. The respondent is Stephanie Kay Lanning. The United States of America, United States Trustee, appeared Amicus Curiae in the appellate proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jan Hamilton, Chapter 13 Trustee, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-32) is reported at 545 F.3d 1269. The Bankruptcy Appellate Panel's opinion (App. 33-53) is reported at 380 B.R. 17. The Memorandum and Opinion of the Bankruptcy Court (App. 54-82) is not officially reported, but can be found at 2007 WL 1451999.

JURISDICTION

The judgment of the Court of Appeals was entered November 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 110-448, 11 U.S.C. §§ 101-1532, are set forth at App. 83-96.

STATEMENT OF THE CASE

I. Preface

The issue in controversy is how to calculate the amount an above-median income Chapter 13 debtor must pay her unsecured creditors under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Prior to the enactment of BAPCPA, a debtor was required to commit to her plan all of her "projected disposable income" to be received in the three-year period beginning with the first plan payment. The amount of disposable income was historically determined by an analysis of debtor's monthly income, as reflected on Schedule I (Official Form 61) minus debtor's monthly expenses as reflected on Schedule J (Official Form 62). In large part, the amount paid to debtor's unsecured creditors was determined by her current ability to pay.

Since BAPCPA became effective, a debtor must pay her "projected disposable income to be received in the applicable commitment period" *to her unsecured creditors* pursuant to 11 U.S.C. § 1325(b)(1)(B). A Chapter 13 debtor is also now required to complete a Statement of Current Monthly Income and Disposable Income Calculation (Official Form 22C). Fed. R. Bankr. P. 1007(b)(6). As noted by the Tenth Circuit, § 1325(b)(3) does not refer to Form 22C, but it does provide that expenses for above-median debtors must be calculated in accordance with 11 U.S.C. §§ 707(b)(2)(A) & (B), commonly referred to as the "means test." The means test requires the use of

national and local IRS standards in determining expenses and deductions. "Current monthly income" is determined in accordance with 11 U.S.C. § 101(10A)(A)(i). The Judicial Conference of the United States created Form B22C, *see* Fed. R. Bankr. P. 9009, and since passage of BAPCPA, above-median income Chapter 13 debtors use that form (now Official Form 22C) to determine income and expenses according to the means test. *See In re Skvorecz*, 369 B.R. 638, 642 (Bankr. D. Colo. 2007).

Form 22C starts its calculation with debtor's average monthly income over the six months prior to the bankruptcy filing pursuant to 11 U.S.C. 101(10A). From this "historical average" income figure, the form then instructs a debtor with income that is above the median income for the debtor's household size and geographic region, to deduct the appropriate statutory and IRS standard deductions to determine a net "Monthly Disposable Income Under § 1325(b)(2)."

The current controversy is whether these mechanical calculations determine the amount that a Chapter 13 debtor must pay to her unsecured creditors (the "mechanical" approach), or whether the court may consider a debtor's actual anticipated income over the life of the plan in determining the amount required to be paid to unsecured creditors (the "forward-looking" approach). An underlying issue is whether a debtor's "projected disposable income," a term not specifically defined in BAPCPA, differs from a debtor's "disposable income," a term that is defined in 11 U.S.C. § 1325(b)(2) and is incorporated into Form 22C.

The Trustee contends that with the implementation of BAPCPA, Congress fashioned a rigid, mechanical test to determine a debtor's projected disposable income. Judicial discretion has been statutorily eliminated. 11 U.S.C. § 1325(b)(1)(B) prohibits the confirmation of a plan, over the objection of the Trustee or an unsecured creditor, which proposes to pay less to unsecured creditors than the projected disposable income as calculated by Form 22C. This interpretation is consistent both with the plain language of the amendment and congressional intent. Additionally, the Trustee contends that "disposable income," as defined in § 1325(b)(2), is the same as "projected disposable income." The Trustee asserts that the various phrases employed by the courts below and others in the majority camp are judicial creations at odds with the clear language of the statute and apparent congressional intent.

The Court of Appeals for the Tenth Circuit affirmed the Bankruptcy Appellate Panel and Bankruptcy Court and rejected the Trustee's "mechanical" approach in favor of the "forward-looking" approach. Although there is a clear split in the circuits, the Tenth Circuit's decision is in the majority camp. *In re Frederickson*, 545 F.3d 652, 659-60 (8th Cir. 2008).

II. Facts of the Case

The facts of this case were largely stipulated to and are undisputed. Debtor Stephanie Lanning filed her Chapter 13 bankruptcy petition on October 16,

2006, together with her Schedules, Statement of Financial Affairs, Statement of Current Monthly Income and Disposable Income Calculation (Official Form 22C), and Chapter 13 Plan. On line 20 of her Form 22C, Debtor reported Current Monthly Income of $5,343.70, her average monthly income in the six months prior to filing. This income is annualized to $64,123.34. Debtor claims a household size of one, and the applicable median family income for purposes of determining whether Debtor is above or below median income is $36,631.00. Thus, Debtor is "above-median income" for her household size and geographic region. Because Debtor is "above-median", she completed the remainder of Form 22C, as the form directs, taking allowed statutory and IRS standard deductions, resulting in monthly disposable income of $1,114.96 on Line 58 of the form.

Debtor's Form 22C income figures differ from those on Debtor's bankruptcy Schedule I. Debtor reports actual current monthly income of $1,922.00 on Schedule I, which is annualized to $23,064, and is notably less than the applicable median income above. Additionally, Debtor's Schedule J indicates monthly expenses totaling $1,772.97, with resultant net excess monthly income per Debtor's Schedules (Schedule I minus Schedule J) of $149.03. Debtor's Chapter 13 Plan proposed a monthly plan payment of $144.00 per month for 36 months and to pay unsecured creditors "any funds not necessary to satisfy administrative expenses, secured claims and priority claims within the initial 36 months of this plan."

Debtor reported that the income reflected by Form 22C was inflated due to "buyout" payments that Debtor received from a previous employer during the six months prior to filing, which increased Debtor's monthly gross income to $11,990.03 for April of 2006 and $15,356.42 for May of 2006.

Debtor filed a Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does Not Determine Plan Payment on January 4, 2007. The Trustee filed a response in opposition to this motion on January 17, 2007. The Trustee also filed an Objection to Confirmation of Debtor's Plan. As part of his objection, the Trustee asserted that Debtor must pay to her unsecured creditors the net result of Form 22C and also that Debtor's plan must run 60 months, the appropriate "applicable commitment period" for a debtor with above-median income, rather than the proposed 36 months.

In its decision entered on May 15, 2007, the Bankruptcy Court sustained the Trustee's objection to confirmation as it related to the length of the plan and held that an above-median income case must run 60 months, unless the unsecured creditors are to be paid in full. However, the Bankruptcy Court overruled the remainder of the Trustee's objection and granted the Debtor's request to deviate from the Form 22C conclusion, finding that "the net income number obtained from Form B22C is the debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in

circumstances such that the numbers contained in that form are not commensurate with a fair projection of debtor's income in the future." *In re Lanning*, 2007 WL 1451999 at 2 (Bankr. D. Kan. 2007). The Bankruptcy Court had jurisdiction to decide the matter as an issue relating to confirmation pursuant to 28 U.S.C. § 157(b)(1)(L).

III. The Appeal to the Bankruptcy Appellate Panel and Tenth Circuit Court of Appeals.

The Trustee filed a Notice of Appeal and Petition requesting permission to directly appeal to the Tenth Circuit Court of Appeals on May 23, 2007. The appeal was docketed at the Bankruptcy Appellate Panel for the Tenth Circuit (the "BAP") on May 29, 2007. The Petition for direct appeal was denied by the Court of Appeals on September 5, 2007, and thus the appeal proceeded at the BAP. The BAP had jurisdiction over the matter pursuant to 28 U.S.C. § 158 and Fed. R. Bankr. P. 8003. The BAP affirmed the Bankruptcy Court's decision on December 13, 2007, and the BAP mandate was issued on December 27, 2007. The Trustee appealed the BAP decision to the Tenth Circuit Court of Appeals on January 2, 2008. The Court of Appeals had jurisdiction over the matter pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 158(d)(1). The Court of Appeals affirmed the decisions of the lower courts on November 13, 2008, and issued its mandate on December 8, 2008. The Debtor has not participated in the appeal. However, the

United States appeared Amicus Curiae at both the BAP and Court of Appeals level.

REASONS FOR ALLOWANCE OF THE WRIT

Whether a bankruptcy court may ignore the Form 22C result and, consequently, the plain language of 11 U.S.C. § 1325(b) by relying instead on the actual results of Schedule I, presents a question of nationwide importance. There is currently a clear circuit split on the issue. Moreover, this split appears district by district and, in some instances, even judge by judge within a single district or city. The most direct impact of this ruling is on the amount of money debtors will repay to creditors in Chapter 13. However, the effects of this decision will extend beyond the specific statutes at issue. The underpinnings of this ruling lie in the exercise of unwarranted judicial discretion that is at odds with both the clear language of the statute and apparent congressional intent.

I. Review Is Warranted to Resolve the Conflict Between Circuits as to the Interpretation of 11 U.S.C. § 1325(b)(1)(B).

In addition to the Tenth Circuit decision currently before the Court, two other circuit courts have ruled on the issue to date. The Eighth Circuit has ruled in favor of the "forward-looking" approach. *In re Frederickson*, 545 F.3d 652 (8th Cir. 2008).

However, the Ninth Circuit has favored the "mechanical" approach asserted by the Trustee. *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008). *Kagenveama* conflicts directly with the Tenth Circuit and Eighth Circuit rulings.

A. The Forward-Looking Approach

In *Lanning*, the Tenth Circuit held that, "[A]s to the income side of the § 1325(b)(1)(B) inquiry, the starting point for calculating a Chapter 13 debtor's 'projected disposable income' is presumed to be the debtor's 'current monthly income,' as defined in 11 U.S.C. § 101(10A)(A)(i), subject to a showing of a substantial change in circumstances." *In re Lanning*, 545 F.3d 1269, 1282 (10th Cir. 2008). In *Frederickson*, the Eighth Circuit Court of Appeals also aligned with the majority in adopting what has been coined the forward-looking approach. The court explains:

> "[W]e adopt the view shared by many bankruptcy courts that a debtor's 'disposable income' calculation on Form 22C is a starting point for determining the debtor's 'projected disposable income,' but that the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J."

In re Frederickson, 545 F.3d at 659. It is important to note that *Lanning* is a more narrow decision than *Frederickson*. In *Lanning*, the Bankruptcy Court

ruled that an above-median income debtor is limited on the expense side of the projected disposable income calculation to those expenses allowed under 11 U.S.C. §§ 707(b)(2)(A) and (B). *In re Lanning*, 2007 WL 1451999 at 17 (Bankr. D. Kan. 2007). The expense portion of the Bankruptcy Court's decision was not appealed. The Tenth Circuit is also quite clear that it has ruled in this case only "as to the income side of the § 1325(b)(1)(B) inquiry." *In re Lanning*, 545 F.3d at 1282. *Frederickson* suggests that a debtor's actual expenses may also be considered. *In re Frederickson*, 545 F.3d at 659.

A crucial element to the forward-looking approach is the determination that "disposable income" as defined in § 1325(b)(2) must have a different definition than "projected disposable income" as utilized by § 1325(b)(1)(B). The Tenth Circuit indicated that "Congress must have intended 'projected disposable income' to be different than 'disposable income' when it chose to define only the latter term for purposes of § 1325(b)." *In re Lanning*, 545 F.3d at 1280, *citing In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006). These courts insist that one must look to the debtor's ability to pay over the life of the case to give effect to the words "projected" and "to be received" in § 1325(b)(1)(B), as not doing so would render the words superfluous. *In re Lanning*, 545 F.3d at 1280.

In adopting the forward-looking approach, the Tenth Circuit also approved the Bankruptcy Court's notion that the changes to § 1325(b)(1) now created a

"rebuttable presumption" as to the amount to be paid to unsecured creditors, although there is nothing in the statute or legislative history to support that proposition.

B. The Mechanical Approach

The other side of the split of authority is the Ninth Circuit Court of Appeals' decision in *Kagenveama, supra*. This decision represents the mechanical approach advocated by the Trustee, in that one simply applies the statute's mathematical formula, now embodied in Official Form 22C. In *Kagenveama*, the court cited this Court's decision in *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993), for the proposition that courts must give meaning to every clause and word of a statute. *In re Kagenveama*, 541 F.3d at 872. The *Kagenveama* court reasoned that "projected" is just a modifier of the defined term "disposable income," and in order to give meaning to every word of 1325(b)(1), "disposable income" as defined by 1325(b)(2) is "projected" out over the applicable commitment period. *Id.* Thus, "disposable income" and "projected disposable income" are part and parcel of the same concept and both require a simple mathematical formula. As cited by the *Kagenveama* court, "If 'disposable income' is not linked to 'projected disposable income' then it is just a floating definition with no apparent purpose." *Id., citing In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006).

The mechanical approach is also clearly in line with this Court's ruling in *Lamie v. United States Trustee,* 540 U.S. 526, 124 S.Ct. 1023 (2004). The language of § 1325(b)(1) is clear on its face. It would require a substantial ambiguity to permit the courts to essentially rewrite the statute. As this Court stated in *Lamie*, the fact that a statute is awkward, or even ungrammatical, does not make it ambiguous, so as to permit the court to resort to its legislative history in interpreting it. *Lamie v. United States Trustee*, 540 U.S. at 534.

Kagenveama also rejects the "presumptively correct" or "rebuttable presumption" concept, as such a presumption is not articulated anywhere in § 1325(b)(1). *In re Kagenveama*, 541 F.3d at 874. Further, since Congress included a presumption in 11 U.S.C. § 707(b) ("presumed abuse"), it is apparent that it knew how to create such a presumption but chose not to do so in § 1325(b)(1).

C. The Lack of Uniformity in Interpretation of 11 U.S.C. § 1325 (b)(1)(B) Has Resulted in Myriad Approaches at the Bankruptcy Court and BAP Levels.

The enormity of the problem created by these varying interpretations is particularly evident at the BAP and bankruptcy court levels. *In re Hanks,* 362 B.R. 494 (Bankr. D. Utah 2007) and *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) demonstrate this pointedly, when courts sitting in the same city,

reading the same statute, came to completely opposite conclusions, all the while each claiming its view was the "plain reading" view of the statute.

Many courts have ruled that Form 22C is merely a starting point. *In re Pak*, 378 B.R. 257, 268 (9th Cir. BAP 2007) *abrogated by In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) ("'disposable income' as defined in § 1325(b)(2), is the starting point for determining 'projected disposable income,' subject to adjustment, based on evidence, to reflect reality going forward."), *see also*, *In re Petro*, 395 B.R. 369 (6th Cir. BAP 2008); *In re Kibbe*, 361 B.R. 302 (1st Cir. BAP 2007); *In re Slusher*, 359 B.R. 290 (Bankr. D. Nev. 2007); *In re Meek*, 370 B.R. 294 (Bankr. D. Idaho 2007); *In re Mullen*, 369 B.R. 25 (Bankr. D. Or. 2007); and *In re Zimmerman*, 2007 WL 295452 (Bankr. N.D. Ohio 2007). It is difficult to determine, from any of these decisions, what "starting point" means and how exactly the concept is to be applied.

In contrast, numerous cases in addition to *Kagenveama* support the Trustee's position that Form 22C is determinative of the return that must be paid to unsecured creditors for above-median debtors. *See In re Hanks*, 362 B.R. 494 (Bankr. D. Utah 2007) ("Form B22C is determinative of the return to general unsecured creditors for above-median debtors unless 'special circumstances' can be shown under § 707(b)(2)(B)"); *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006) ("in order to arrive at 'projected disposable income,' one simply takes the calculation mandated by § 1325(b)(2) and does the math");

In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006) ("it appears that Congress intended to adopt a specific test to be rigidly applied rather than a standard to be applied according to the facts and circumstances of the case."); *In re Simms*, Slip Copy, 2008 WL 217174 (N.D.W.Va. 2008) ("the Court concludes that when an objection is filed under § 1325(b), Form B22C is the method by which the Debtor's disposable income is to be determined – it is not to be determined by deducting Schedule J expenses from the net income stated on Schedule I"); *In re Mancl*, 381 B.R. 537, 541 (W.D. Wis. 2008) ("The only reasonable interpretation of the phrase 'projected disposable income' is properly calculated current monthly income projected forward for each month during the plan commitment period."). *See also*, *In re Kolb*, 366 B.R. 802 (Bankr. S.D. Ohio 2007) and *In re Miller*, 361 B.R. 224 (Bankr. N.D. Ala. 2007). In so ruling, courts have determined that a court's ability to determine the reasonableness of an above-median income debtor's expenses in calculating disposable income "has been curtailed by BAPCPA." *See In re Tuss*, 360 B.R. 684 (Bankr. D. Mont. 2007); *In re Tranmer*, 355 B.R. 234 (Bankr. D. Mont. 2006); *In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); and *In re Barr*, 341 B.R. 181 (Bankr. M.D.N.C. 2006). "Form B22C" and "Form 22C" are used herein interchangeably. Interim Form B22C became Official Form 22C when the official forms were adopted. *In re Lanning*, 380 B.R. 17, 20 (10th Cir. BAP 2007).

It is apparent that the split in the circuits on these issues is suggestive of the magnitude of the problem. The BAP and bankruptcy courts are in a state of disarray. On the one hand some courts simply apply the statute without permitting modification. On the other are varied approaches, all of which involve the substitution of judicial discretion for statutory mandate. Because of the split among the circuits and the starkly contrasting decisions at the BAP and bankruptcy court levels, this Court should resolve the question of whether 11 U.S.C. § 1325(b)(1) is to be interpreted strictly or whether considerable judicial discretion allows courts to circumvent congressional mandate because the results may sometimes not appear to be fair. To allow bankruptcy courts to create judicial exceptions to the statute essentially places us back to determining the confirmability of a debtor's plan on the basis of debtor's schedules.

The language used by these courts, however well intentioned, constitutes legislation by invention, rather than interpretation of the congressional mandates. This is in spite of the fact that the statute, however objectionable one may find it, is clear on its face. No one would deny that the mechanistic approach urged by Trustee might create harsh results, one way or the other. However, from the scant legislative history on BAPCPA, it is apparent that Congress was persuaded that trustees, the courts and attorneys should have less, not more, discretion.

II. Review Is Necessary Because the Tenth Circuit's Interpretation of 11 U.S.C. § 1325(b) Disregards the Plain Meaning of the Statute.

A. The Bankruptcy Statutes Provide a Clear and Unequivocal Road Map.

11 U.S.C. § 1325(b)(1)(B), provides, in material part:

> [I]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan – the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

§ 1325(b)(2) additionally states:

> [f]or purposes of this subsection, the term "disposable income" means *current monthly income* received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for the child) less

> amounts reasonably necessary to be expended – (list of various deductions omitted.) (emphasis added).

"Current monthly income" or "CMI" is defined in 11 U.S.C. § 101(10A) as, "[t]he average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on . . . " (Generally the last day of the calendar month preceding the date of the filing of the bankruptcy petition, with certain exceptions not material to this case.)

11 U.S.C. § 1325(b)(2) makes debtor's "disposable income" dependent upon the debtor's "current monthly income." *In re Kibbe*, 361 B.R. 302, 307 (1st Cir. BAP 2007). Once the debtor's CMI is calculated, § 1325(b)(2) directs that certain expenses, those that are reasonably necessary for the maintenance and support of the debtor or debtor's dependents, must be deducted from the debtor's CMI. 11 U.S.C. § 1325(b)(3) clarifies that for an above-median debtor, the "amounts reasonably necessary to be expended under paragraph (2) *shall be determined* in accordance with subparagraphs (A) and (B) of section 707(b)(2)" (emphasis added). These expenses are, in large part, not a reflection of debtor's actual expenses, but rather standards issued by the Internal Revenue Service. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

The above-quoted statutes set forth a precise, unambiguous method for determining how a debtor's monthly "disposable income" is to be calculated. Thus, appropriate resolution of this case turns on whether or not the term "projected disposable income" under § 1325(b)(1)(B) differs (and if so, in what way) from the term "disposable income" as defined in § 1325(b)(2). Although the bankruptcy code defines "disposable income," it fails to provide a specific definition for "projected disposable income."

The mechanical camp suggests that the proper interpretation of "projected disposable income" requires the court to take the debtor's "disposable income" as determined by For 22C, and project it forth over the applicable commitment. Those rulings that hold otherwise presume that the word "projected" requires the Court to consider the debtor's *actual* future income and expenses. *In re Har lacre*, 338 B.R. at 723 (finding that the language of § 1325(b)(1)(B) suggests congressional intent to refer to the income actually to be received by the debtor during the commitment period, rather than the pre-petition average income.) This is an unwarranted distinction and one not imposed by the bankruptcy code. The Court can give meaning to the term "projected" by "projecting forward" the Form 22C calculations without deviating from the mechanical test imposed by the language of § 1325(b)(1)(B) and (b)(2). This can be accomplished by merely multiplying the net "disposable income" figure as calculated on Form

22C by the applicable commitment period. *In re Hanks*, 362 B.R. at 499.

Courts ruling "projected disposable income" and "disposable income" are inherently different concepts do not consider that "disposable income" is specifically defined in the code, without reference to debtor's schedules. *See In re Alexander*, 344 B.R. at 749, also *In re Miller*, 361 B.R. at 235. The definition of disposable income is not to be ignored simply because the term is preceded by the modifier "projected." At least one court has found such an interpretation untenable, as noted in *In re Mancl*, 381 B.R. at 541:

> "To adopt the majority view, one must assume that Congress created the precise and objective current monthly income definition of § 101(10A), mandated that bankruptcy courts apply it to the § 1325(b) test, and then added the term "projected" to empower bankruptcy courts to ignore the § 101(10A) definition, substituting their own sense of fairness by applying the former process of analyzing and comparing schedules I and J."

The intent of Congress to view "projected disposable income" consistently with the definition of "disposable income" provided in § 1325(b)(2) is also evident when one turns to other code sections that reference the term, particularly 11 U.S.C. § 1129(a)(15)(B). That section states, in pertinent part:

> (15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan . . .
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer."

11 U.S.C. § 1129(a)(15)(B). It is clear here that the drafters intended "projected disposable income" to have a definition consistent with that given to "disposable income" in § 1325(b)(2). There is nothing, in the statute or otherwise, to suggest that Congress intended anything different when it referenced "projected disposable income" in the context of § 1325(b)(1)(B).

B. Courts Have Overextended the "Absurd Results" Language from *Lamie* to Stray from the Plain Language of 11 U.S.C. § 1325(b), and, as a Result, Review Is Necessary to Eliminate Judicial Grafting onto BAPCPA.

With each court contending that its interpretation faithfully adheres to the "plain meaning" of the statute, courts have introduced to the bankruptcy lexicon a host of new phrases that have now been

grafted onto BAPCPA. The courts below (and others) have relied upon the phrase "substantial changes in circumstances" to justify a departure from Form 22C. Other phrases, such as "presumptively correct" and "starting place" seem to have become de facto amendments to § 1325. However, 11 U.S.C. § 1325, in conjunction with Official Form 22C, leaves no room for such interpretations.

When a statute's language is plain, the sole function of the court is to enforce it according to its terms, except where doing so would lead to "absurd results." *Lamie v. U.S. Trustee*, 540 U.S. 526, 533, 124 S. Ct. 1023 (2004). "Absurd results" has become the escape hatch for any judge that wants to ignore the congressional mandate of § 1325. Many courts, including the bankruptcy court below, have determined that the results under the mechanical approach are "absurd," and therefore have deviated from the congressional mandate, which requires a debtor to pay her unsecured creditors her projected disposable income, without reference to exceptions if debtor feels this calculation does not accurately reflect her income. *In re Lanning*, 2007 WL 1451999 at 13. The phrase has taken on a life of its own, reducing congressional dictate to optional guidance that is followed only if the sitting judge favors the result. These are treacherous waters. Using "absurd results" as a North Star in bankruptcy cases could easily result in dozens of variations on the theme, as individual judges pick and choose á la carte what portions of the code they want to enforce.

The Trustee concedes that if the Debtor in this case is required to pay to unsecured creditors the disposable income calculation per Form 22C, she may be effectively denied relief under Chapter 13, in that it is likely impossible for the Debtor to propose a feasible plan. Although the results of this interpretation may at times be harsh, that does not necessarily mean the results are absurd. *In re Hanks,* 362 B.R. at 502 ("[A] harsh or even illogical result is not the same thing as an absurd result, and this Court must therefore interpret the statute according to its own terms."). *See also, In re McGillis*, 370 B.R. 720 (Bankr. W.D. Mich. 2007). Of course, the debtor always has control over the date of the filing of the petition, and, therefore, the precise days encompassed within the 6-month look back period. Further, a recent decision, *In re Shelor*, Slip Copy, 2008 WL 4344894 (Bankr. M.D.N.C. 2008), suggests that in § 101 (10A)(A)(ii), Congress cryptically provided a methodology for a debtor to avoid the sometimes harsh results of Form 22C. This provision essentially provides that instead of a look back period using the six months prior to filing, the debtor can have the court determine a different 6-month period by not filing Shedule I. This means that the 6-month look back period could be at any time up to confirmation, which may be a moving target. This approach would appear to soften the seeming harshness of the 101(10A)(A)(i), but would require the debtor to make an election at the time of filing in order to implement an alternative time frame.

Although the results of the mechanical approach would be unfortunate for the current debtor, the results may be more "debtor-friendly" in other cases. *See, e.g., Kagenveama, supra*. Strict adherence to the disposable income calculation of Form 22C could result in an above-median income debtor having actual excess income that the debtor is not required to commit toward the payment of unsecured debts if debtor's actual income has increased above the pre-petition average. *See In re Barr*, 341 B.R. at 185.

Judge Brown of the District of Vermont analyzes the use of historical income in § 1325 and the role of the judiciary in its interpretation:

> "One may question the logic of relying upon historical data, and debate whether it yields a reliable prediction of the Debtors' ability to make plan payments, or constitutes the best formula for computing those payments. But such differences of opinion are based on the policy implications of the amended statute and do not make the statute ambiguous or the result absurd. There is no inherent flaw in calculating disposable income based upon an historical figure, or in using the result of that computation in a forward-looking projection of income through the commitment period . . . Congress declared that the historical income data from the six months prior to the filing of the bankruptcy petition is a more reliable indicator of a debtor's future financial situation than the income on the day the debtor filed for bankruptcy relief, and has directed courts to

> adjust their starting point for analyzing Chapter 13 plans accordingly. While this may constitute a dramatic change from pre-BAPCPA policy – and a point upon which reasonable minds may differ – it is well within the prerogative of our Legislative branch to make such changes. It is the role of the Judicial branch to carry them out."

In re Austin, 372 B.R. 668, 679 (Bankr. D. Vt. 2007).

Another court, finding that the projected disposable income for an above-median income debtor must be determined solely by Form 22C opined,

> "While this provision of the new statute does not perform as advertised, perhaps prompting trustees, unsecured creditors and even some bankruptcy judges to long for the "good old days" of reviewing Schedules I and J and determining whether private school, high speed internet access, and a pack-a-day habit were reasonable and necessary for the debtor's maintenance and support, the mandate of new § 1325(b)(3) is clear."

In re Guzman, 345 B.R. 640, 646 (Bankr. E.D. Wis. 2006).

For better or worse, Congress enacted BAPCPA, and it is within the discretion of Congress to fix it. The result supported by the courts below is in direct conflict with this Court's guidance in *Lamie*, in which the Court stated, "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically

enacted." There is no gap here. *Lamie* also says: "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *Lamie,* 540 U.S. at 542, citing *United States v. Granderson,* 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion).

C. What Little Legislative History Exists Supports the Mechanical Approach.

Even if it is appropriate to examine congressional history, it must be noted that the congressional record is almost nonexistent. *See In re Jass*, 340 B.R. 411, 416. It is because of the lack of a legislative record that courts on all sides of the issue contend their positions are consistent with congressional intent, with scant support for these claims.

In *Jass,* the court indicated that there was no congressional intent expressed to change the pre-BAPCPA practice of analyzing Schedules I and J to determine a debtor's disposable income, and thus, such an analysis remains proper. *In re Jass*, 340 B.R. at 416. The *Jass* court additionally held that, as in the present case, requiring the debtors to pay the disposable income amount resulting from Form 22C would render any plan the debtor proposes unfeasible, which is at odds with the code's overall policy of providing debtors with a "fresh start." *In re Jass*, 340 B.R. at 417. However, the *Hanks* court counters with alternative interpretations:

> "The court in *In re Ott* discussed the 'lens' through which Congress apparently viewed debtors in enacting the BAPCPA, the creditor-friendly nature of most of the BAPCPA's provisions, and Congress' perception of abuse and lack of personal financial accountability on the part of debtors in bankruptcy. Whether justified or not, the result of Congress' efforts was 'a law that is sometimes self-executing, inflexible, and unforgiving.' It is not at all clear that Congress did not actually intend to keep people out of bankruptcy altogether if possible or perhaps to push them into individual chapter 11 cases, nor is it clear that a 'fresh start' is still the overriding policy of the portions of the Bankruptcy Code at issue in this case. Perhaps the concept of current monthly income is an expression of Congress' intent that debtors should attempt to resolve their financial difficulties outside of bankruptcy for a period of time before filing. Indeed, this view would jibe with the new prepetition briefing requirement in § 109(h)(1) that contemplates meaningful credit counseling and the performance of budget analyses within six months of filing as well as the requirement in § 521(b)(2) that the debtor file a copy of any debt repayment plan developed during the prepetition counseling session."

In re Hanks, 362 B.R. at 500, discussing *In re Ott*, 343 B.R. 264 (Bankr. D. Colo. 2006).

Prior to implementation of BAPCPA, Chapter 13 Trustees quite vocally advised legislators that basing

the amount to be paid to unsecured creditors upon a formula of "current monthly income" minus deductions might not reflect a debtor's actual income, but despite these warnings, no changes were made. *In re Alexander*, 344 B.R. 742, 747 (Bankr. E.D.N.C. 2006) ("Chapter 13 Trustees recognized early on that this redefinition of disposable income meant some high-income debtors would pay less than they would have under the variant judicial tests and local legal culture that previously measured the chapter 13 disposable income. The chapter 13 trustees repeatedly made their concerns known to Congress, asking that CMI less deductions be a minimum, not the maximum, but no changes were made.") (quoting Marianne B. Culhane and Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?* 13 Am.Bankr.Inst.L.Rev. 665, 681 (2005)). In spite of the concerns raised and the warnings given by Chapter 13 Trustees, Congress chose to leave intact provisions BAPCPA that effectively discarded the Schedule I vs. J approach and substituted the mechanical approach. Given the plain language of the statute and the warnings that were given to Congress of the problems being created, the Trustee suggests that the courts have overstepped their bounds. If there are problems with the current statutory framework, the resolution must be legislative, and not judicial.

Of note, both the BAP and the Tenth Circuit quote from *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998), to support the proposition that the bankruptcy code should not be read to erode past

bankruptcy practice absent a clear indication that Congress intended such a departure. The Trustee suggests that if there was ever a statute drafted intended to change past practice, BAPCPA is it, and as a result, *Cohen* is not applicable to this case. If Congress had not intended change, why would it amend the statute? The changes made to the bankruptcy code by BAPCPA, clearly were intended to effect major changes to the way cases are administered. The changes were many, far-reaching and clearly intended to not only erode, but to alter the shoreline in an immediate and drastic manner.

As is evident from the over three years of debate following implementation of BAPCPA, the practical application of its provisions was apparently not of great congressional concern. Congress was perfectly aware that prior to BAPCPA, Courts had discretion to perform a case-by-case analysis, yet it chose to implement a standardized formula with the amendment. That standardized formula simply does not allow for case-by-case examination of the facts and circumstances of a particular debtor's financial affairs beyond that reflected in Form 22C. This Court should exercise its discretion in reviewing the courts below to assist all involved in the bankruptcy process in properly administering BAPCPA, in particular, 11 U.S.C. § 1325(b).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment below.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: STEPHANIE KAY LANNING, Debtor, ---------- JAN HAMILTON, Chapter 13 Trustee, Appellant, v. STEPHANIE KAY LANNING, Appellee, ---------- UNITED STATES OF AMERICA; UNITED STATES TRUSTEE, Amici Curiae.	No. 08-3009

APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT
(BAP No. KS-07-067)
(Bankr. No. 06-41037)

(Filed Nov. 13, 2008)

Submitted on the briefs:*

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Before **MURPHY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

BRORBY, Senior Circuit Judge.

This bankruptcy appeal presents a question of first impression in this circuit: What is the proper way to calculate the "projected disposable income" of

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

an above-median Chapter 13 debtor under amendments to the bankruptcy code effected by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA)? In this case, the United States Bankruptcy Court for the District of Kansas adopted the "forward-looking approach," which is the method adopted by the majority of bankruptcy courts and bankruptcy appellate panels (BAPs) that have considered the question. Under that approach, a Chapter 13 debtor's six-month, pre-petition "disposable income" (as defined by statute) is presumed to be the debtor's "projected disposable income" for purposes of establishing the monthly sum that the debtor must commit to repayment of unsecured creditors in order to advance a confirmable payment plan and overcome objections to it. The forward-looking approach permits the amount of projected disposable income to be rebutted upon a showing of special circumstances at the time of plan confirmation.

In the course of its analysis, the bankruptcy court rejected a different method, the "mechanical approach," which equates a Chapter 13 debtor's projected disposable income with the statutorily defined "disposable income" and then "projects" that amount over the length of the applicable commitment period. It does not permit adjustment to projected disposable income to account for special circumstances at the time of plan confirmation.

In affirming the bankruptcy court's decision, the Tenth Circuit BAP also adopted the forward-looking

approach and its rebuttable presumption. *See In re Lanning,* 380 B.R. 17 (10th Cir. B.A.P. 2007). For the reasons discussed below, we also adopt the "forward-looking approach." Exercising our jurisdiction under 28 U.S.C. §§ 158(d)(1) and 1291, we affirm the BAP's decision.

I. Factual Background

The parties stipulated to the relevant facts. The debtor, Stephanie Kay Lanning, is a single woman with no children and a Kansas resident. She filed a Chapter 13 petition on October 16, 2006, to address $36,793.36 in unsecured debt. Her annual gross income was $43,147 in 2004, and $56,516 in 2005. During the six-month period before filing her petition, Ms. Lanning took a buyout from her employer, Payless, that increased her monthly gross income to $11,990.03 in April 2006 and $15,356.42 in May 2006.

As part of her petition, Ms. Lanning filed Schedule I ("Current Income of Individual Debtor(s)"), which showed a monthly net income of $1,922 ($23,604 annually), apparently reflecting actual income from a job she started after leaving Payless. App. at 31. She also filed Schedule J ("Current Expenditures of Individual Debtor(s)"), which showed actual monthly expenses of $1,772.97 and, consequently, excess monthly income of $149.03. *Id.* at 32. In addition, Ms. Lanning completed Form B22C (now denominated Form 22C), "Statement of Current Monthly Income and Disposable Income Calculation."

Id. at 40-43. Form B22C first requires a debtor to calculate "current monthly income" as an average of income for the six calendar months immediately preceding the month in which the petition is filed. *Id.* at 40. Under this formula, Ms. Lanning's "current monthly income" was $5,343.70, which included the buyout from Payless. When that figure was annualized, her income ($64,124.34) was greater than the median income for a family of one in Kansas ($36,631.00), so she was required to complete the remainder of Form B22C, on which most expenses and other deductions are calculated by reference to standard sums issued by the Internal Revenue Service (National and Local IRS Standards). *Id.* at 41-43. According to her Form B22C, Ms. Lanning's total monthly expenses were $4,228.71, leaving her with "Monthly Disposable Income Under [11 U.S.C.] § 1325(b)(2)" of $1,114.98. *Id.* at 43.

Based on the excess monthly income of $149 shown on Schedule J, Ms. Lanning proposed a repayment plan of $144 per month for thirty-six months ($5,184) as satisfaction of the $36,793.36 in unsecured debt. She moved the bankruptcy court to determine that 11 U.S.C. § 1325(b)(1)(B) did not require her to commit the $1,114.98 in monthly disposable income calculated on Form B22C (which included her buyout) to repayment of the unsecured creditors. Section 1325(b)(1)(B) is the primary statute involved in this case, and when, as here, a Chapter 13 debtor proposes a plan that contemplates less than full repayment of all allowed unsecured claims and there

is an objection, that section conditions plan confirmation as follows:

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –
>
> . . .
>
> (B) the plan provides that all of the debtor's **projected disposable income** to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. § 1325(b)(1)(B) (emphasis added).[1]

Although none of the unsecured creditors objected to the proposed plan, the Chapter 13 Trustee did, arguing that § 1325(b)(1)(B) provides a rigid formula for determining projected disposable income that is based on a debtor's historical monthly income as calculated on Form B22C. The Trustee proposed that a monthly payment of $756 (less than Ms. Lanning's Form B22C "monthly disposable income" of $1,114.98) for sixty months would repay the unsecured creditors in full, despite acknowledging that

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[1] All statutory citations are to the current, post-BAPCPA versions unless otherwise noted.

Ms. Lanning did not have the means to fund such a plan.

II. The Bankruptcy Court's Decision

The bankruptcy court rejected the mechanical approach that the Trustee advocated. The court noted that the term "projected disposable income" is not defined in § 1325(b)(1)(B), but that § 1325(b)(2), as amended by the BAPCPA, defines "disposable income":

> (2) For purposes of this subsection, the term "disposable income" means **current monthly income** received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –
>
> (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
>
> (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of

> the debtor for the year in which the contributions are made; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2) (emphasis added).

In turn, the bankruptcy court looked to the statutory definition of "current monthly income" that Congress added with the BAPCPA. In relevant part, "current monthly income"

> (A) means the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on –
>
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii) [i.e., Schedule I][.]

Id. § 101(10A)(A)(i). The court also found relevant a new clause added to § 1325(b) by the BAPCPA that, for above-median debtors, requires the use of the standardized expenses and deductions calculated on Form B22C as the "[a]mounts reasonably necessary to be expended" under § 1325(b)(2) (with the

exception of charitable contributions under (b)(2)(A)(ii)). *Id.* § 1325(b)(3).[2]

In light of these statutory provisions, the bankruptcy court presumed that the "monthly disposable income" reflected on Form B22C constituted "projected disposable income" under § 1325(b)(1)(B), subject to a showing "that there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future." App. at 126 (quotation omitted). The court observed that the words "projected" and "to be received" in § 1325(b)(1)(B) would be superfluous if a debtor's historical average income was the only consideration. *Id.* at 123. The court also placed significance on Schedule I's mandate that a debtor provide an "'[e]stimate of average or projected monthly income at time case filed,'" an estimate of "'monthly overtime,'"

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[2] Section 1325(b)(3) does not refer to Form B22C, but it does provide that expenses for above-median debtors must be calculated in accordance with 11 U.S.C. § 707(b)(2)(A) & (B), commonly referred to as the "means test," which is used for determining whether a debtor is abusing the Chapter 7 process. The means test requires the use of National and Local IRS Standards in determining expenses and deductions, and "current monthly income" to determine income. The Judicial Conference of the United States created Form B22C, *see* Fed. R. Bankr. P. 9009 (Official Forms are those "prescribed by the Judicial Conference"), and since passage of the BAPCPA, above-median Chapter 13 debtors use that form (now Form 22C) to determine income and expenses according to the means test, *see In re Skvorecz*, 369 B.R. 638, 642 (Bankr. D. Colo. 2007).

and a description of "'any increase or decrease in income reasonably anticipated to occur within the year following the filing of [Schedule I].'" *Id.* at 123-24 (quoting Schedule I).[3] The court reasoned that "Schedule I tries to capture what income debtors actually will have to fund a plan." *Id.* at 124. The court also noted that the prefatory portion of § 1325(b)(1) requires the determination of "projected disposable income" to be made "'as of the effective date of the plan.'" *Id.* (quoting 11 U.S.C. § 1325(b)(1)). As to each of these observations, the court pointed out that "Schedule I assists courts in determining whether the plan is properly committing all this income, and clearly calls for the Court to consider income to be received during the life of the plan." *Id.*

Finally, the bankruptcy court reasoned that the mechanical approach "leads to absurd results that are at odds with both congressional purpose and common sense." *Id.* Specifically, where a debtor's income at the time of confirmation has dropped significantly from the six-month pre-petition average (i.e., the current monthly income calculated on Form B22C), the court observed that the debtor would be unable to file a feasible and confirmable plan under the mechanical approach. *Id.* This would deny Chapter 13 protection to those most in need of bankruptcy

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[3] The copy of Ms. Lanning's Schedule I in the appendix appears to be a truncated version (or possibly an earlier version) of Schedule I. *See* App. at 31. The currently available form contains in full the language quoted by the bankruptcy court.

protection – debtors whose "financial situation has significantly deteriorated over the six months prior to filing." *Id.* at 125. The court further noted that even when, at the time of plan confirmation, a debtor has more disposable income than indicated by Form B22C, the mechanical approach would require confirmation of a plan over objection even though the debtor would not be paying all that she was able to pay to unsecured creditors. *Id.* at 126.

Applying its interpretation of § 1325(b)(1)(B), the bankruptcy court determined that the monthly disposable income shown on Ms. Lanning's Form B22C ($1,114.98) was not controlling. Instead, the court used her Schedule I income ($1,922) and then subtracted her Form B22C expenses ($4,228), which yielded a negative number. The court stated, however, that if Ms. Lanning were to pay nothing to the unsecured creditors, she could not formulate a feasible plan that meets the requirements of § 1325(a), which, among other things, requires a showing that "the debtor will be able to make all payments under the plan and to comply with the plan," 11 U.S.C. § 1325(a)(6). The court then concluded that "[n]othing prevents debtors from electing to pay more than the statutory means test requires, in order to meet the requirement that a plan must be feasible." App. at 131. Accordingly, the court agreed to confirm Ms. Lanning's $144-per-month plan provided that it

continued for sixty months rather than thirty-six months.[4]

III. The BAP Decision

The Trustee appealed to the BAP, which affirmed, holding that if "it is shown that Form B22C disposable income fails accurately to predict a debtor's actual ability to fund a plan, that figure may be subject to modification." *In re Lanning,* 380 B.R. at 25. The BAP discussed the judicial camps of thought on the issue, then pointed out that the BAPCPA added a definition of "disposable income" but left unchanged the term "projected disposable income," which had an established meaning under pre-BAPCPA law – essentially Schedule I income minus Schedule J expenses, subject to adjustment if there was reason to believe that those schedules did not accurately predict a debtor's actual ability to pay. The BAP concluded that although the BAPCPA amendments "specify the formula by which to determine a debtor's median standing, as well as the monthly disposable income as of the date of the petition, they give us no reason to believe that Congress intended to eliminate the bankruptcy courts' discretion to deviate

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[4] The ruling on the relevant duration of the commitment period is not at issue in this appeal. Also not at issue is the bankruptcy court's holding that Ms. Lanning's Form B22C expenses were the relevant expenses for purposes of arriving at her "projected disposable income," even though those expenses were greater than her actual, Schedule J expenses.

from an application of that formula where significant circumstances support doing so." *Id.* at 24; *see also id.* n.23 (quoting *Cohen v. de la Cruz,* 523 U.S. 213, 221 (1998), for the proposition that "the Bankruptcy Code should not be read 'to erode past bankruptcy practice absent a clear indication that Congress intended such a departure'" (further quotation omitted)). The BAP adopted a rebuttable presumption that the Form B22C figures were correct subject to a showing of "a substantial change in circumstances" by way of documentation similar to that required by Chapter 7 debtors under the means test. *In re Lanning,* 380 B.R. at 25. The BAP "emphasize[d] that deviation from the Form B22C determination of disposable income will be the exception rather than the rule." *Id.*

Unsuccessful before the BAP, the Trustee filed the present appeal. Ms. Lanning has not participated in this appeal (and she did not participate in the appeal to the BAP), but the United States and the United States Trustee have filed a combined amicus brief opposing the Trustee's position (as they did before the BAP).

IV. Standard of Review

"On appeal from BAP decisions, we independently review the bankruptcy court's decision." *Lampe v. Williamson (In re Lampe),* 331 F.3d 750, 753 (10th Cir. 2003). The issue in this case is one of statutory interpretation, which is reviewed de novo. *See Office of Thrift Supervision v. Overland Park Fin. Corp.*

(In re Overland Park Fin. Corp.), 236 F.3d 1246, 1251 (10th Cir. 2001).

V. BAPCPA Amendments and Interpretive Judicial Decisions

The issue to be resolved is whether the "projected disposable income" referred to in § 1325(b)(1)(B) is calculated by mechanical application of the definitions of "disposable income" and "current monthly income" set forth in §§ 1325(b)(2) and 101(10A)(A)(i), respectively, or whether it is permissible to adjust the "monthly disposable income" calculated on Form B22C to account for a debtor's actual ability to fund a plan as of the effective date of the plan. "It is well established that when [a] statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004) (quotation omitted). Here, the statutory language may be plain, but it is unclear in its meaning. Thus, before turning to an analysis of the statutory language, we briefly will review the relevant changes Congress made (and did not make) when it enacted the BAPCPA, and then consider a number of judicial decisions representative of the two methods used to calculate "projected disposable income."

A. BAPCPA Amendments

In passing the BAPCPA, Congress left § 1325(b)(1)(B) substantially unchanged (for present purposes), the only differences being that the pre-BAPCPA version (1) referred to a "three-year period" rather than the "applicable commitment period" as the relevant time period over which the debtor's plan must apply "projected disposable income" to plan payments (now three years for below-median debtors and five years for above-median debtors); and (2) required all such "projected disposable income" to be "applied to make payments under the plan," 11 U.S.C. § 1325(b)(1)(B) (2000), rather than, more narrowly now, to make payments to the unsecured creditors. Thus, the relevant language of § 1325(b)(1)(B) is substantially the same now as it was before passage of the BAPCPA, i.e., that all "projected disposable income to be received in the applicable commitment period . . . will be applied to make payments." As the BAP pointed out, the pre-BAPCPA language meant that "projected disposable income" was the difference between a debtor's Schedule I income and her Schedule J expenses, subject to adjustment by the court if there was reason to believe that those schedules "did not accurately predict a debtor's actual ability to pay." *In re Lanning*, 380 B.R. at 24; *see also In re Nahat*, 315 B.R. 368, 378-79 (Bankr. N.D. Tex. 2004).

Next, prior to passage of the BAPCPA, "disposable income" was defined as "income which is received by the debtor and which is not reasonably necessary to be expended" for the debtor's maintenance,

support, charitable contributions, and business expenses. 11 U.S.C. § 1325(b)(2)(A) (2000). With the BAPCPA, Congress changed the definition of "disposable income" by tying it to a new term, "current monthly income," 11 U.S.C. § 1325(b)(2), and adding the definition of "current monthly income" that in relevant part, as noted above, looks at the debtor's six-month pre-petition income, *id.* § 101(10A)(A)(i). Finally, the BAPCPA added a new clause to § 1325(b) that, for above-median debtors, requires the use of the standardized expenses and deductions calculated on Form B22C as the "[a]mounts reasonably necessary to be expended" under § 1325(b)(2) (with the exception of charitable contributions under (b)(2)(A)(ii)). *See id.* § 1325(b)(3).

With this understanding of the relevant changes to the BAPCPA, we now turn to judicial decisions representative of the two interpretations of post-BAPCPA § 1325(b)(1)(B).

B. Courts adopting the "forward-looking approach"

The first court to address the issue appears to be *In re Hardacre,* 338 B.R. 718 (Bankr. N.D. Tex. 2006).[5] In *Hardacre,* the court expressed concern about the consequences when "current monthly income" derived from Form B22C is used as the sole

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[5] Although the discussion in *Hardacre* is judicial dicta, we find the analysis enlightening and persuasive.

determinant of the "income" side of the "projected disposable income" calculation. *Id.* at 722. The court reasoned that a debtor expecting a significant increase in future income would file as quickly as possible, resulting in the commitment of less money to repay unsecured creditors than the debtor would actually be capable of paying during the commitment period. *Id.* Conversely, the court observed that a debtor who experiences a decrease in income after filing might not be able to confirm a plan because she would be unable to commit the amount of disposable income calculated on Form B22C. *Id.*

The *Hardacre* court offered three justifications in support of its conclusion that "'projected disposable income' must be based upon the debtor's anticipated income during the term of the plan, not merely an average of her prepetition income." *Id.* First, noting the rule of statutory construction that requires a court "to presume that 'Congress acts intentionally when it includes particular language in one section of a statute but omits it in another,'" the court reasoned that "Congress must have intended 'projected disposable income' to be different than 'disposable income'" when it chose to define only the latter term. *Id.* at 723 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994)). Second, the court viewed the phrase "to be received" in § 1325(b)(1)(B) as an expression of congressional intent "to refer to the income actually to be received by the debtor during the commitment period, rather than the prepetition average income"; an alternative interpretation, the court said, would

render "to be received" superfluous. *Id.* And third, the court considered § 1325(b)(1)'s prefatory language – "as of the effective date of the plan" – to be an indication that "'projected disposable income' . . . refers to income that a debtor reasonably expects to receive during the term of her plan." *Id.*

A number of other courts, including one circuit court recently, have applied *Hardacre*'s reasoning in adopting the forward-looking approach. *See, e.g., Coop v. Frederickson (In re Frederickson)*, No. 07-3391, ___ F.3d ___, 2008 WL 4693132 (8th Cir. Oct. 27, 2008); *Hildebrand v. Petro (In re Petro)*, No. 08-8009, ___ B.R. ___, 2008 WL 4601471 (6th Cir. B.A.P. Oct. 17, 2008); *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302 (1st Cir. B.A.P. 2007) (per curiam); *In re Watson*, 366 B.R. 523 (Bankr. D. Md. 2007); *In re Pak*, 357 B.R. 549 (Bankr. N.D. Cal. 2006), *aff'd*, 378 B.R. 257 (9th Cir. B.A.P. 2007), *abrogated by Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008); *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006); and *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006). Most courts applying this approach view Form B22C as presumptively correct regarding income.[6]

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[6] At least one court has disregarded Form B22C and looked instead to the debtor's Schedule I. *See In re Demonica*, 345 B.R. 895, 900 (Bankr. N.D. Ill. 2006).

C. Courts adopting the mechanical approach

To date, only one circuit court (other than a BAP) has adopted the mechanical approach. *See Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008). There the court reasoned:

> The substitution of any data not covered by the § 1325(b)(2) definition in the "projected disposable income" calculation would render as surplusage the definition of "disposable income" found in § 1325(b)(2). There can be no reason for § 1325(b)(2) to exist other than to define the term "disposable income" as used in § 1325(b)(1)(B). "If 'disposable income' is not linked to 'projected disposable income' then it is just a floating definition with no apparent purpose." *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006). The plain meaning of the word "projected," in and of itself, does not provide a basis for including other data in the calculation because "projected" is simply a modifier of the defined term "disposable income." Therefore, to give meaning to every word of § 1325(b), "disposable income," as defined in § 1325(b)(2), must be "projected" in order to derive "projected disposable income."

Id. at 872-73. Regarding the pre-BAPCPA treatment of "projected disposable income," the court concluded that

> [a]ny change in how "projected disposable income" is calculated only reflects the changes

> dictated by the new "disposable income" calculation; it does not change the relationship of "projected disposable income" to "disposable income." Pre-BAPCPA, "projected disposable income" was determined by taking the debtor's "disposable income," under § 1325(b)(2)(A) & (B), and projecting that amount over the "applicable commitment period."

Id. at 873 (footnote omitted). The court refused to "read the word 'projected' to be synonymous with the word 'anticipated' in this context." *Id.* at 874.

In addition to *Kagenveama,* a number of bankruptcy courts have adopted the mechanical approach. *See, e.g., In re Austin,* 372 B.R. 668 (Bankr. D. Vt. 2007); *In re Kolb,* 366 B.R. 802 (Bankr. S.D. Ohio 2007); *In re Hanks,* 362 B.R. 494 (Bankr. D. Utah 2007); *In re Miller,* 361 B.R. 224 (Bankr. N.D. Ala. 2007); *In re Tranmer,* 355 B.R. 234 (Bankr. D. Mont. 2006); *In re Alexander,* 344 B.R. 742 (Bankr. E.D.N.C. 2006); and *In re Barr,* 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006). Three of these cases, *In re Alexander, In re Hanks*, and *In re Austin,* discuss matters of particular note.

In *In re Alexander,* the court observed that Congress elected to adopt the redefinition of "disposable income" in § 1325(b)(2) as written despite the warnings of Chapter 13 trustees that strict use of the Form B22C formula would lead to an anomalous result in some cases, namely, that some above-median debtors would pay less than they would prior to

BAPCPA. 344 B.R. at 747. The trustees apparently asked that deducting expenses from "current monthly income" result in a minimum – not a maximum – for repayment to unsecured creditors. *See id.* The *Alexander* court reasoned that the legislature's nonresponse to this concern supported a presumption of legislative awareness and intent regarding the consequences of the language with respect to making debtors pay what they can and preventing abuse. *Id.* at 748.

In the second case of note, *In re Hanks,* the court followed *In re Alexander,* concluding that under the BAPCPA, the "new function" of the word "projected" in § 1325(b)(1)(B) "is solely to multiply the net 'disposable income' figure as calculated on Form B22C by the applicable commitment period. No more, no less." 362 B.R. at 499. *Hanks* viewed the interpretation given to the statute by the majority line of cases to mean that post-BAPCPA, nothing had changed with regard to the calculation of "projected disposable income." *Id.* Alternately, the court opined that the word "projected" could be deleted as surplusage because it is repugnant to the rest of the BAPCPA. *Id.*

Hanks also rejected policy arguments the majority camp has relied on, such as affording bankruptcy protection and a fresh start to debtors who voluntarily and in good faith seek to repay creditors with money they have on hand. *Id.* at 500. The court pointed to competing policies that might have informed Congress's choice of language:

> It is not at all clear that Congress did not actually intend to keep people out of bankruptcy altogether if possible or perhaps to push them into individual chapter 11 cases, nor is it clear that a "fresh start" is still the overriding policy of the portions of the Bankruptcy Code at issue in this case. Perhaps the concept of current monthly income is an expression of Congress' intent that debtors should attempt to resolve their financial difficulties outside of bankruptcy for a period of time before filing. Indeed, this view would jibe with the new prepetition briefing requirement in [11 U.S.C.] § 109(h)(1) that contemplates meaningful credit counseling and the performance of budget analyses within six months of filing as well as the requirement in [11 U.S.C.] § 521(b)(2) that the debtor file a copy of any debt repayment plan developed during the prepetition counseling session.

In re Hanks, 362 B.R. at 500. The court found "statements such as the one in the Purpose and Summary section of the BAPCPA House Report expressing the view that the means testing mechanism 'is intended to ensure that debtors repay creditors the maximum they can afford[,]' H.R. 109-031, Part I, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," to be "insufficient to overcome both the plain language of the statute and the statements' apparent conflict with other policies at play in the BAPCPA." *Id.* at 500 n.23.

The Chapter 13 Trustee quotes at length from the third case of note, *In re Austin,* where the debtors' Form B22C "monthly disposable income" was negative but their I-minus-J calculation left some excess income. The relevant point made in *Austin* is that, in the BAPCPA,

> Congress declared that the historical income data from the six months prior to the filing of the bankruptcy petition is a more reliable indicator of a debtor's future financial situation than the income on the day the debtor filed for bankruptcy relief, and has directed courts to adjust their starting point for analyzing Chapter 13 plans accordingly.

372 B.R. at 679. If this statement is accurate, then an obvious problem arises in cases like Ms. Lanning's, where the factual circumstances differ: despite the view under *Austin* that Ms. Lanning's pre-petition income is a more reliable indicator of her future financial situation, and hence would lead one to believe that she would be capable of paying her Form B22C disposable income to unsecured creditors, she cannot get her plan confirmed because she cannot show that she "will be able to make all payments under the plan and to comply with the plan," as required for confirmation by 11 U.S.C. § 1325(a)(6).

VI. Analysis

As is evident from the foregoing discussion, each interpretation of the statutory language is not without problems. The difficulty with the forward-looking

approach is that it renders the new definition of "disposable income," with its link to historic "current monthly income," nearly meaningless unless one reads a presumption into the statute – that the defined term "disposable income" is just the starting point – which can be rebutted by showing a substantial change in circumstances bearing on how much the debtor realistically can commit to repayment of unsecured creditors as of the effective date of the plan. This was the solution reached in the present case. It is compatible with the statutory language of § 1325(b)(1)(B), the new definition of disposable income, and the use of the means test to standardize an above-median Chapter 13 debtor's expenses, but requires a certain disregard of the notion that Congress knows how to create a presumption when it intends one, *see In re Kagenveama*, 541 F.3d at 874.

The main problem with the analysis in decisions adopting the mechanical approach is that little heed is given to three statutory phrases: "as of the effective date of the plan," 11 U.S.C. § 1325(b); "to be received in the applicable commitment period," *id.* § 1325(b)(1)(B); and "will be applied to make payments," *id.* "[A] cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation omitted). We think that these textual problems, discussed below, outweigh the concern about implying a presumption.

Under § 1325(b)(1)(B), a bankruptcy court may not approve a Chapter 13 plan over objection unless **"as of the effective date of the plan"** the plan "provides that all of the debtor's projected disposable income **to be received in the applicable commitment period** beginning on the date that the first payment is due under the plan **will be applied to make payments** to unsecured creditors under the plan." (Emphasis added.) The first emphasized phrase, "as of the effective date of the plan," indicates that the court should determine, at that time, whether the plan meets the remaining requirements of subparagraph (b)(1)(B). The term "effective date" is not defined in the Bankruptcy Code, but for purposes of § 1325(b)(1), "the most logical interpretation . . . is the date of plan confirmation, as a chapter 13 plan is not binding on the debtor and other interested parties until it is confirmed." *In re Pak,* 378 B.R. at 265 (relying on 11 U.S.C. § 1327(a)), *abrogated on other grounds by In re Kagenveama,* 541 F.3d 868. The date of plan confirmation is practically certain to be later than the date on which the petition is filed, and it is the filing date that starts the backward-looking assessment of "current monthly income." Thus, determining whether or not a debtor has committed all projected disposable income to repayment of the unsecured creditors "as of the effective date of the plan" suggests consideration of the debtor's actual financial circumstances as of the effective date of the plan.

In turn, the remaining statutory requirements are subject to conflicting interpretations. As viewed by mechanical-approach courts, "projected" could mean that a plan simply must project the Form B22C disposable income over the applicable commitment period to determine the amount that "will be applied to make payments" to the unsecured creditors. *See, e.g., In re Kagenveama,* 541 F.3d at 872-73; *In re Hanks,* 362 B.R. at 499. Alternately, under the forward-looking approach, "projected" links "disposable income" and "to be received in the applicable commitment period," requiring the debtor to commit all "disposable income" (as defined by § 1325(b)(2) and its reliance on the definition of "current monthly income") that is "projected . . . to be received in the applicable commitment period." Under this reading, the debtor's actual circumstances at the time of plan confirmation are taken into account in order to "project" (in other words, to "forecast") how much income the debtor will actually receive during the commitment period, which, after deducting permitted expenses, then "will be applied to make payments" to the unsecured creditors, as the statute requires.

The second reading, i.e., the forward-looking approach, strikes us as the better one. As the *Hardacre* court said, Congress defined "disposable income," not "projected disposable income," meaning that "Congress must have intended 'projected disposable income' to be different than 'disposable income'" when it chose to define only the latter term for purposes of § 1325(b). *In re Hardacre,* 338 B.R. at 723.

Unlike the Ninth Circuit in *Kagenveama,* we do not think the forward-looking approach leaves the definition of "disposable income" floating with no apparent purpose. Through its reliance on the statutory definition of "current monthly income," the definition of "disposable income" serves to "describe[ ] the sources of revenue that constitute income, as well as those that do not." *In re Hardacre,* 338 B.R. at 723.

Also, the forward-looking approach gives effect to the phrase "to be received in the applicable commitment period," which otherwise would be rendered superfluous. Under the mechanical approach, the amount "to be received in the applicable commitment period" would be a fiction if, as of the effective date of the plan, the debtor had no realistic expectation of earning enough to produce the amount of "disposable income" calculated on Form B22C. Furthermore, such a debtor could not get the plan confirmed due to infeasibility. *See id.* § 1325(a)(6). This undermines the importance given to historical income as a "better" predictor of "projected disposable income" in *In re Austin,* 372 B.R. at 679.[7]

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[7] As the Trustee points out, the definition of "disposable income" is also used in a Chapter 11 provision added by the BAPCPA that permits confirmation of a plan over the objection of an unsecured creditor only if "the value of the property to be distributed under the plan is not less than the **projected disposable income** of the debtor **(as defined in section 1325(b)(2))** to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is

(Continued on following page)

In addition, language used on Form B22C supports the forward-looking approach. Part VI of Form B22C is titled "Determination of Disposable Income Under § 1325(b)(2)." App. at 43. Similarly, the last line in Part VI of the form is termed "Monthly Disposable Income Under § 1325(b)(2)." *Id.* Although the form is subservient to the statute, *see In re Pak*, 378 B.R. at 271 (concurring opinion), *abrogated on other grounds by In re Kagenveama*, 541 F.3d 868, the absence of the word "projected" and any reference to the phrase "projected disposable income" are consistent with the forward-looking approach.[8]

Legislative materials are of limited assistance in trying to divine the intent of Congress when it defined "disposable income" rather than "projected

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longer." 11 U.S.C. § 1129(a)(15)(B) (emphasis added). But § 1129(a)(15)(B) also uses the phrase "to be received," suggesting a forward-looking, realistic assessment of the debtor's anticipated income during the commitment period, and only the term "disposable income" is defined in § 1325(b)(2), not "projected disposable income." Thus, reference to § 1129(a)(15)(B) offers little support for the Trustee's interpretation of § 1325(b)(1)(B).

[8] Committee notes on the bankruptcy rules also support the forward-looking approach. *See* 11 U.S.C. App'x – Bankruptcy Rules, Committee Notes on Rules – 2005, D.3., at 230 (explaining that the check box on Form B22C that indicates whether "the applicable commitment period under § 1325(b)(4) is three or five years and whether the means test deductions are required by § 1325(b)(3) to be used in determining the debtor's disposable income" is "intended to inform standing trustees and other interested parties about these items, but does not prevent the debtor from arguing that the calculations required by the form do not accurately reflect the debtor's disposable income").

disposable income." Perhaps the best statement of the overarching purpose of the consumer aspects of the BAPCPA comes from a House Report issued by the Committee on the Judiciary just prior to enactment of the bill: "The heart of [BAPCPA's] consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs – based bankruptcy relief' or 'means – testing'), which is intended to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89. Commenting on this statement, one bankruptcy court has pointed out that "[t]he words 'maximum' and 'afford' tell the story. Congress intended that debtors pay the greatest amount within their capabilities. Nothing more; nothing less." *In re Kibbe,* 361 B.R. at 314. While the statement in the House Report is exceedingly general for our purposes and expresses the view only of the members of the Judiciary Committee, it is consistent with the forward-looking approach, which assists a Chapter 13 debtor to propose a confirmable plan and repay creditors the maximum she can afford – no more and no less.

Other courts that have examined congressional intent when confronted with the issue we face have found nothing more definitive. For example, one court applying the mechanical approach has posited that by standardizing income and most expenses to be used in the means test, and in applying the means test to Chapter 13, it may be that Congress intended to limit the judicial discretion historically exercised in

determining what was or was not income or a necessary and reasonable expense under the pre-BAPCPA standard, and to make uniform the often disparate results that the courts had reached regarding the fact of a debtor's ability to pay as well as the amount a debtor could pay. *In re Kolb,* 366 B.R. at 817-18. The inference of congressional intent drawn in *In re Alexander* concerning the apparently unheeded warnings chapter 13 trustees gave to Congress – that Congress adopted the definition of "disposable income" knowing that it might let some Chapter 13 debtors off easy, 344 B.R. at 747 – is one other possible inference. But as the U.S. Trustee points out, "[f]or all anyone knows, Congress may have believed that chapter 13 trustees were mistaken and that section 1325 actually would allow bankruptcy courts to do precisely what the chapter 13 trustees thought it would not." Amicus Br. at 24.

Moreover, when an above-median debtor has Form B22C disposable income under the means test, she will not qualify for Chapter 7 protection. But when that debtor seeks Chapter 13 protection and no longer earns her prepetition income, she will be unable to confirm a plan over objection if bound to historical income and the mechanical approach to § 1325(b)(1)(B). If, as stated in *In re Hanks,* 362 B.R. at 500, Congress may have intended that such a debtor then could seek Chapter 11 protection, it appears the debtor would encounter the same bar to confirmation due to the application of the definition of "disposable income" in 11 U.S.C. § 1129(a)(15)(B)

noted above. Alternately, it could be that Congress intended to foreclose bankruptcy protection to such debtors altogether, but there is no obvious support for attributing such intent to Congress.

Finally, we note that the mechanical approach advocated by the Trustee would effectively foreclose bankruptcy protection to debtors like Ms. Lanning, who lack adequate income going into the commitment period to pay the amount of disposable income on Form B22C, while at the same time permitting above-median debtors who have greater income at the time of plan confirmation to pay less to unsecured creditors than they are able to. While the latter situation could be rectified by post-confirmation modification of the plan under 11 U.S.C. § 1329, the former situation cannot be addressed in this manner because the plan would be infeasible and therefore unconfirmable in the first place. A Chapter 13 debtor may modify the plan prior to confirmation under 11 U.S.C. § 1323(a), but any effort by the debtor to deviate from Form B22C "disposable income" through pre-confirmation modification begs the question of whether the forward-looking approach is proper or not.

VII. Conclusion

For the foregoing reasons, we hold that, as to the income side of the § 1325(b)(1)(B) inquiry, the starting point for calculating a Chapter 13 debtor's "projected disposable income" is presumed to be the debtor's "current monthly income," as defined in 11 U.S.C.

§ 101(10A)(A)(i), subject to a showing of a substantial change in circumstances. We have not been asked to determine whether the change in Ms. Lanning's particular circumstances was substantial, and we leave it to the bankruptcy courts to determine whether an adequate showing of changed circumstances has been made in each particular case. The judgment of the BAP is AFFIRMED.

UNITED STATES
BANKRUPTCY APPELLATE PANEL
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Barbara A. Schermerhorn
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Stephanie Freeman
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Kelly Clements Hopfer
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Deputy Clerk

January 9, 2008

TO: All Recipients of the Captioned Opinion
RE: BAP No. KS-07-067, *In re Lanning*
Filed December 13, 2007;
Hon. William T. Thurman, authoring
Previously corrected January 8, 2008

Please be advised of the following corrections to the captioned decision:

On page 6 of the decision, each of the three references to "section 1325(a)(5)(B)" should be deleted, and in their stead reference "section 1325(b)(1)(B)."

Please make these corrections to your copy of the decision.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By: /s/ Stephanie Freeman
Deputy Clerk

UNITED STATES
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January 8, 2008

TO: All Recipients of the Captioned Opinion
RE: BAP No. KS-07-067, *In re Lanning*
Filed December 13, 2007;
Hon. William T. Thurman, authoring

Please be advised of the following corrections to the captioned decision:

Page 1, second line of the decision: The phrase "confirming the Debtor's proposed plan and denying the Trustee's objection to it" is amended to read "denying one of his objections to the Debtor's proposed plan."

Page 2, the first full paragraph should be deleted and instead read: "This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit and,

with leave of court, interlocutory orders. 28 U.S.C. § 158; *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997); Fed. R. Bankr. P. 8003. On July 31, 2007, this Court granted the Appellant's Motion for Leave to Appeal Interlocutory Order. Therefore, this Court has jurisdiction over this appeal."

Page 12, the last full paragraph should be deleted and instead read: "The bankruptcy court's order denying the Trustee's objection to the Debtor's proposed plan, on the ground that it proposes to pay less than the Debtor's projected disposable income as calculated by Form B22C, is therefore AFFIRMED."

A copy of the Opinion as corrected is attached.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By: /s/ Stephanie Freeman
Deputy Clerk

PUBLISH

UNITED STATES
BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT

IN RE STEPHANIE KAY LANNING, Debtor,	BAP No. KS-07-067
JAN HAMILTON, Trustee, Appellant,	Bankr. No. 06-41037 Chapter 13 OPINION (Filed Dec. 13, 2007)

Appeal from the United States
Bankruptcy Court
for the District of Kansas

Submitted on the briefs:*

Jan Hamilton, pro se, and Teresa L. Rhodd, Chapter 13 Trustee's Office, Topeka, Kansas, for Appellant.

---

* The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Joyce Owen, Assistant United States Trustee and Richard A. Wieland, Acting United States Trustee, of the United States Trustee's Office, Wichita, Kansas (Roberta A. Deangelis, Acting General Counsel, P. Matthew Sutko, and Melissa R. Burgess of the Executive Office for United States Trustees, Washington, D.C., of counsel) for United States Trustee as Amicus Curiae supporting affirmance.

Before BOHANON, McNIFF, and THURMAN, Bankruptcy Judges.

THURMAN, Bankruptcy Judge.

In this case, the Chapter 13 Trustee appeals the bankruptcy court's order denying one of his objections to the Debtor's proposed plan. Although the Debtor did not participate in this appeal, the United States Trustee's Office filed an amicus brief in support of the bankruptcy court's decision. For the reasons stated herein, we AFFIRM.

I. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit and, with leave of court, interlocutory orders. 28 U.S.C. § 158; *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997); Fed. R. Bankr. P. 8003.

On July 31, 2007, this Court granted the Appellant's Motion for Leave to Appeal Interlocutory Order. Therefore, this Court has jurisdiction over this appeal.

II. BACKGROUND

The facts relevant to this appeal are uncontested, and were presented to the bankruptcy court by stipulation. The Debtor's annual income was $43,147 in 2004, and $56,516 in 2005. She filed a petition for Chapter 13 relief on October 16, 2006, and timely filed her Statement of Financial Affairs and her schedules. During the six months preceding the filing, the Debtor received a buy-out from her employer that resulted in an increase in her monthly income to $11,990 in April 2006, and $15,356 in May 2006. In connection with the buy-out, Debtor's employment was terminated. Therefore, at the time of filing, her actual monthly income (as shown on Schedule I) was $1,922, which is $23,604 when annualized. However, due to the "bump" in income she received in April and May, the Debtor's "current monthly income" (as determined by her Statement of Current Monthly Income, or "Form B22C"[1]) was $5,344, or $64,124

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[1] Actually, Form B22C is an interim form that became Form 22C once the BAPCPA official forms were adopted. Many opinions continue to refer to the form as "B22C," and many jurisdictions are still using up their interim forms. In this case, Debtor filled out a form designated as "B22C." However, our analysis is equally applicable to either.

annually. Since the median annual income for a family of one in Kansas is $36,631, the Debtor's annualized "current monthly income" is well above-median, which subjects her to the more rigorous standards applicable to above-median debtors.[2]

The Debtor's actual monthly expenses (as shown on Schedule J) total $1,773, while her deductions on Form B22C total $4,228. Thus, under the pre-BAPCPA "I minus J" formula, the Debtor would have excess monthly income (available for plan payments) of $149 ($1,922 actual income minus $1,773 actual expenses). However, the figure resulting from the calculation of Debtor's monthly "disposable income" on Form B22C is $1,114 ($5,344 "current monthly income" minus $4,228 using the standardized deductions).

III. ISSUE AND STANDARD OF REVIEW

We here deal with an issue of interpretation of a statute that has received a great deal of attention in the courts: May an above-median debtor's "projected disposable income," pursuant to 11 U.S.C. § 1325(b)(1)(B),[3] deviate from "current disposable

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[2] The Debtor's annual income prior to the buy-out and loss of her former job was also above the median annual income for a family of one in Kansas.

[3] Unless otherwise indicated, all statutory references contained herein are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

income" determined under Form B22C, where the debtor establishes such a significant change in circumstances that "current disposable income" does not accurately or fairly project her future ability to pay creditors?

The interpretation of statutes is an issue of law that is subject to *de novo* appellate review.[4] *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[5]

IV. DISCUSSION

Prior to passage of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005, the income available to a Chapter 13 debtor for repayment of debts was typically determined by a relatively straightforward formula. A debtor's monthly income was reported on Schedule I of his or her bankruptcy schedules, and the reasonably necessary expenses were reported on Schedule J. Once these numbers were determined to be allowable and accurate, the amount left over after Schedule J's total was subtracted from Schedule I's total was generally the amount that was designated under the debtor's plan as available for payment to creditors for the plan period. Under BAPCPA, debtors still report their

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[4] *In re Overland Park Fin. Corp.*, 236 F.3d 1246, 1251 (10th Cir. 2001).

[5] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

actual monthly income and expenses on Schedules I and J. However, BAPCPA created a new method for determining the amount debtors are required to pay under their plans. Thus, plan payments are no longer determined solely by the "I minus J" calculation.

"Current monthly income" is defined under BAPCPA as "the average monthly income from all sources that the debtor receives . . . during the 6-month period" preceding filing of the petition.[6] That figure can be "annualized" by multiplying it by twelve. Once the debtor's current annual income is determined, it is compared to the "median income" level for the debtor's family size and place of residence (as provided by the U.S. Census Bureau), and a determination is made as to whether the debtor's income is above or below the median for their circumstances. A finding that a debtor is "above-median" is significant because, pursuant to section 1325(b)(3) and (4), above-median debtors are required both to use standardized deductions[7] and to make plan payments for five years instead of three.[8] Thus, an

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[6] § 101(10A).

[7] Standardized deductions are determined by the IRS and National Standards and Local Standards, and are set forth in 11 U.S.C. § 707(b)(2).

[8] We note that there is some dispute regarding the "applicable commitment period" where an above-median debtor has no Form B22C disposable income. *Compare, e.g., In re Alexander*, 344 B.R. 742, 750-51 (Bankr. E.D.N.C. 2006), *with In re Beckerle*, 367 B.R. 718, 719-20 (Bankr. D. Kan. 2007). However, although plan duration was a consideration before the bankruptcy court

(Continued on following page)

above-median debtor's "disposable income" is defined as "current monthly income" minus the standardized deductions.[9] Form B22C is the vehicle by which a debtor's "disposable income" is determined.

In this appeal, the amount determined by the Form B22C calculations to be the Debtor's monthly "disposable income" is not contested, nor is her designation as "above-median." The only issue before this Court is how the Debtor's "projected disposable income" is determined. The import of this determination is that section 1325(b)(1)(B) only allows court approval of a proposed plan over the trustee's objection if the plan provides for payment of "all of the debtor's *projected disposable income* to be received" during the plan period (emphasis added). According to the Trustee, an above-median debtor's "projected disposable income" is simply a multiple of their Form B22C "disposable income."[10] Using this analysis, the

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in the present case, it was not raised as an issue on appeal and, therefore, we do not attempt to resolve it here.

[9] § 1325(b)(2).

[10] The Trustee's interpretation of "projected disposable income" involves a number of mathematical calculations that conclude with the equation "projected disposable income = monthly disposable income." First, Form B22C "current monthly income" is determined by averaging the debtor's total income over a previous six month period. Next, that figure is multiplied by 12 in order to determine the debtor's median standing. In the case of an above-median debtor, standardized deductions set forth on Form B22C are then subtracted from current monthly income to determine "monthly disposable income." Monthly disposable income may then be multiplied by 60 to determine

(Continued on following page)

Debtor's plan could not be approved unless it provided for 60 payments of $1,115 each, for a total payout of $66,900 over five years. Given Debtor's actual monthly income of $1,922, such payments would leave her with only $807 to pay her $1,773 expenses. Thus, the Trustee's interpretation of section 1325(b)(1)(B) requires the Debtor to commit to payments she cannot possibly make in order to obtain the protections afforded by bankruptcy.[11]

This Court has not had occasion to consider this particular application of BAPCPA previously. However, other courts that have addressed the definition of "projected disposable income" generally fall into one of two groups. The first group, which has generated the majority of published decisions on the issue, holds that the term "projected" in section 1325(b)(1)(B) modifies "disposable income" such that

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the "projected" amount of the debtor's total plan payments. However, the total amount the debtor pays over the life of the plan is essentially meaningless, since plans simply provide for 60 monthly payments of "monthly disposable income." Thus, the Trustee's interpretation essentially renders the term "projected" meaningless.

[11] The standardized deductions for housing, utilities, food, clothing, and household and personal care supplies for a family of one in Kansas total $1,574, without including transportation, taxes, health care, and telecommunication expenses. Nonetheless, this figure alone exceeds what the Trustee would have Debtor live on by $767 per month. That the Trustee has neither alleged that the Debtor lacked good faith in filing her petition, nor challenged the Debtor's "actual" income or expense figures, makes such an outcome seem especially unreasonable.

the determination of the amount a debtor must propose to pay over the plan commitment period may require consideration of more than just the Form B22C mathematical calculation of "disposable income."[12] In other words, the term "projected disposable income" is not simply a multiple of "disposable income." These cases typically reason that Congress's use of the term "projected" and the phrase "to be received by the debtor" in section 1325(b)(1)(B) indicates an intent that bankruptcy courts consider a debtor's *future* ability to pay in determining projected disposable income. This result is based, in part, on the well-established principle of statutory construction that, when particular language is used in one part of a statute but not in another, Congress must have intended for that language to add meaning to the defined phrase.[13] Thus, these cases conclude that "projected disposable income" means something more than simply "disposable income."

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[12] The bankruptcy court's published decision in this case provides an excellent summary of cases in this category, which can be found at *In re Lanning*, No. 06-41037, 2007 WL 1451999, at *4, n.18 (Bankr. D. Kan. May 15, 2007).

[13] *See Negonsott v. Samuels*, 507 U.S. 99, 106 (1993) (in its interpretation of a statute, a court must give meaning and import to every word in the statute); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (it must be assumed that "Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another") (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)).

A number of other well-reasoned cases disagree with this analysis and insist on a more narrow interpretation of the term "projected disposable income" and the calculations from Form B22C.[14] Thus, these cases reason that the BAPCPA amendments did in fact eliminate bankruptcy court discretion, and that the Form B22C calculations are binding, regardless of changed circumstances.[15] Whereas courts interpreting section 1325(b)(1)(B) to allow consideration of changed circumstances reason that the term "projected" must have some independent meaning, the

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[14] The bankruptcy court's decision also provides a summary of this line of cases. *See In re Lanning*, 2007 WL 1451999 at *5, n.20. We note that the minority line of reasoning has, on occasion, been referred to as the "plain meaning" interpretation, based on statements in some of the cases to the effect that their interpretation of § 1325 is dictated by the plain meaning of the term "projected." On the other hand, at least one majority decision concluded "that the language of § 1325(b)(1)(B) is clear and unambiguous" in connection with its holding that use of the term "projected" next to "disposable income" requires courts to consider both "future and historical finances." *See In re Jass*, 340 B.R. 411, 415-16 (Bankr. D. Utah 2006). Given the potential for confusion between cases relying on "plain meaning" and "clear and unambiguous" statutory language to reach opposite results, we prefer the term "more narrow interpretation" in referring to the minority line of reasoning.

[15] Not all courts in this category consider such a method of calculation to be an improvement over the pre-BAPCPA method. Thus, the court in *In re Kolb*, 366 B.R. 802, 820 (Bankr. S.D. Ohio 2007) described its holding as "the unfortunate result of a congressionally-created system that uses rigid formulas to calculate a debtor's chapter 13 plan payments rather than considering a debtor's present financial reality and ability to pay."

more narrow interpretation courts consider that determination to be an inflation of the term's importance, and that "projected" quite simply means multiplied.

The Bankruptcy Appellate Panel of the First Circuit ("First Circuit BAP") has adopted the majority view in a below-median debtor's appeal of the rejection of her proposed plan.[16] In *Kibbe,* because the calculation of the debtor's Form B22C disposable income was negative, she had proposed a plan that provided no payments for the benefit of her unsecured creditors. The trustee objected to confirmation on the ground that the debtor had obtained a higher-paying job shortly before filing her petition, and her actual income was nearly $2,400 more than her expenses.[17] Thus, the trustee in *Kibbe* took the same position taken by the Debtor in the present case, that bankruptcy courts may still consider significant changes in circumstances that cause Form B22C's "monthly disposable income" to be an inaccurate projection of a debtor's future ability to make plan payments. The bankruptcy court agreed, and rejected the debtor's plan. On interlocutory review, the First Circuit BAP

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[16] *In re Kibbe*, 361 B.R. 302 (1st Cir. BAP 2007).

[17] The *Kibbe* debtor's Schedule J expenses were used in both determinations of her disposable income, because below-median debtors do not use the Form B22C standardized deductions that are used by above-median debtors. As in the present case, there was no dispute in *Kibbe* regarding that debtor's median placement, which is a determination based on historical income.

affirmed, specifically rejecting an interpretation of "projected" as a synonym for "multiplied," and relying on the reasoning of the courts in *Jass*[18] and *Hardacre*[19]:

> In the event that a debtor's "current monthly income" as set forth by Form B22C is substantially the same as the actual current income at the time of confirmation of the plan, less the Income Exclusions, the inquiry begins and ends with Form B22C. But where, as here, the "current monthly income" amount is not true to the debtor's *actual* current income, courts should assume that Congress intended that they rely on what a debtor can realistically pay to creditors through his or her plan and not on any artificial measure. Attaching the word "projected" to a historical calculation assumes, without justification, that a debtor's circumstances will not change after the date of case commencement or during the plan commitment period. Life informs otherwise. Insofar as the term "disposable income" demands a look back and the term "projected" requires a look forward, the language is irreconcilable. One must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both.[20]

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[18] *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006).

[19] *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

[20] *Kibbe*, 361 B.R. at 312 (footnote omitted).

The *Kibbe* court held that Form B22C monthly disposable income is ordinarily a sufficient indication of "projected disposable income." However, where either the debtor's actual income at confirmation or the "reasonably anticipated" income over the plan period is not "substantially the same" as the Form B22C figure, the bankruptcy court must consider those facts in determining the debtor's "projected" income. The *Kibbe* court concluded that, to interpret section 1325(b)(1)(B) otherwise, would deny both debtors and creditors the protections that Congress intended them to have under Chapter 13.

Another recent appellate decision addressing this issue is *In re Pak*.[21] As did *Kibbe*, the *Pak* case involved a below-median debtor whose income had dramatically increased shortly before his bankruptcy filing, and who proposed plan payments that were well below his actual ability to pay. Again, the trustee's objection to the proposed plan was accepted by the bankruptcy court, which refused to confirm the plan. The debtor's subsequent refusal to propose a different plan caused his case to be dismissed. The Ninth Circuit BAP affirmed the bankruptcy court's refusal to confirm, stating:

> [W]e agree with the bankruptcy courts in both *Jass* and *Alexander*, 344 B.R. [742 (Bankr. E.D. N.C. 2006)] at 748, that the

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[21] No. NC-07-1201, 2007 WL 4126749 (9th Cir. BAP Nov. 7, 2007).

> calculated "disposable income" of the debtor must be the starting point in determining "projected disposable income." The standards for determining "disposable income" initially anchor the term "projected disposable income." However, if the interpretation of "projected disposable income" is not to degenerate into absurdity, deriving "projected disposable income" from "disposable income" must be subject to the presentation of contrary evidence before confirmation of a debtor's chapter 13 plan. "Chapter 13 is not some alternative universe where reality dare not intrude." [*In re*] *Mullen,* 369 B.R. [25 (Bankr. D. Or. 2007)] at 34. It makes no sense to interpret "projected disposable income," governing debtors' future payments under their chapter 13 plans, as cast in stone by their pre-bankruptcy history, without any opportunity for the trustee, creditors *or the debtor* to offer rebutting evidence as to changed income circumstances before the effective date of the plan.[22]

As noted by most of the courts attempting to resolve this issue, although BAPCPA added a definition of "disposable income," it neither defined nor modified the pre-existing term "projected disposable income." Thus, BAPCPA linked "disposable income" to Form B22C current monthly income, which is a historically based figure, but it left "projected disposable income,"

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[22] *Id.*, at *7.

which had an established pre-BAPCPA treatment, alone. Prior to the amendment of section 1325, Schedules I and J were the main reference points for determining debtors' projected disposable income. However, if the bankruptcy court had reason to believe that those schedules did not accurately predict a debtor's actual ability to pay, other evidence was also considered. As such, pre-BAPCPA, projected disposable income was not determined solely by a mathematical formula. Although the amendments to section 1325 specify the formula by which to determine a debtor's median standing, as well as the monthly disposable income as of the date of the petition, they give us no reason to believe that Congress intended to eliminate the bankruptcy courts' discretion to deviate from an application of that formula where significant circumstances support doing so.[23]

Therefore, we agree with the courts that have found "disposable income" to be only the starting point in determining "projected disposable income" under section 1325(b)(1)(B). Where it is shown that Form B22C disposable income fails accurately to predict a debtor's actual ability to fund a plan, that figure may be subject to modification. This position is

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[23] *See Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) (the Bankruptcy Code should not be read "to erode past bankruptcy practice absent a clear indication that Congress intended such a departure") (quoting *Penn. Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990)).

both analogous to, and consistent with, BAPCPA amendments to section 707, which were intended to divert debtors with the financial ability to pay at least something to their unsecured creditors out of Chapter 7 and into Chapter 13. Thus, section 707(b)(2)(A)(i) now includes a presumption that granting a Chapter 7 discharge would be an "abuse" of the provisions of Chapter 7 whenever a debtor's Form B22C "current monthly income" falls within certain parameters, following application of a purely mathematical formula to it. However, section 707(b)(2)(B)(i) allows debtors to rebut that presumption "by demonstrating special circumstances . . . that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."

Chapter 7 debtors seeking to rebut the abuse presumption are required to itemize their increased expenses or changes in income, to provide both documentation and a detailed explanation of the "special circumstances" they claim, and to attest to them under oath.[24] Given section 707's similar use of Form B22,[25] we look to that section for guidance in considering a Chapter 13 debtor's claim that a substantial change of circumstances justifies a similar deviation

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[24] § 707(b)(2)(B)(ii), (iii).

[25] Chapter 7 debtors use Form 22A, rather than Form 22C. However, as their designation implies, these two forms are simply variations of the same form, each of which has been modified to apply to either Chapter 7 or Chapter 13 debtors.

from Form B22C. Therefore, parties contending that a debtor's Form B22C disposable income figure does not accurately project the debtor's future ability to fund a plan must present documentation similar to that required by section 707(b)(2)(B)(ii) in support of their claim. However, we emphasize that deviation from the Form B22C determination of disposable income will be the exception rather than the rule.

V. CONCLUSION

The bankruptcy court's order denying the Trustee's objection to the Debtor's proposed plan, on the ground that it proposes to pay less than the Debtor's projected disposable income as calculated by Form B22C, is therefore AFFIRMED.

[SEAL]

SO ORDERED.

SIGNED this 15 day of May, 2007.

/s/ Janice Miller Karlin
JANICE MILLER KARLIN
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	
STEPHANIE KAY LANNING,	**Case No. 06-41037**
Debtor.	**Chapter 13**
IN RE:	
JESUS MARCARIO AVILA,	**Case No. 06-41260**
Debtor.	**Chapter 13**

MEMORANDUM AND OPINION SUSTAINING TRUSTEE'S OBJECTION TO CONFIRMATION

The Chapter 13 Trustee has objected to confirmation of the plans in these two cases.[1] In each case, the

[1] The objection in Lanning is Doc. 34; the objection in Avila is Doc. 14. Debtor Lanning also filed a Motion to Determine that Chapter 13 Statement of Current Monthly Income and Disposable Income (Form B22C) Does not Determine Plan Payment (Doc. 21), which motion is, essentially, granted by this order, under the terms set out herein.

Debtor's actual income is considerably less than his or her historical income as a result of changes in employment that occurred in the six-month period prior to filing. The Court must interpret certain provisions of the Bankruptcy Code, as recently amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),[2] to decide whether the income shown on Form B22C is determinative, or whether circumstances exist under which the Court may use Schedule I to determine such debtors' projected disposable income. The Court must also determine over how many months an above-median income debtor must pay his or her creditors under the facts of these cases.

The Court has jurisdiction to decide these issues pursuant to 28 U.S.C. 157(b)(1) and §§ 1334(a) and (b). Confirmation of a plan is a core proceeding that this Court may hear and determine pursuant to 28 U.S.C. § 157(b)(2)(L).

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[2] These cases were filed after October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. Pub. L. 109-8. All future statutory references are thus to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101-1532 (2005), unless other specifically noted. Any reference to the Bankruptcy Code as it existed prior to the 2005 amendments will be referred to as 11 U.S.C. § ___ (2004) or to Pre-BAPCPA § ___.

Summary of Decision

The Court adopts the majority approach that the net income number obtained from Form B22C is the debtor's "projected disposable income" unless the debtor can show that there has been a substantial change in circumstances such the numbers contained in that form are not commensurate with a fair projection of the debtor's income in the future. On the expense side, above-median income debtors must deduct from income the expenses they itemize on Form B22C to arrive at the minimum amount that they must pay to unsecured creditors, except for limited exceptions not expressly argued here. The Court further holds that above-median income debtors must make payments for five years, unless unsecured creditors will earlier be paid in full.

I. Facts

A. Lanning

Debtor, Stephanie Lanning, and the Trustee have agreed to submit the issues based on stipulated facts, which the Court summarizes. Debtor filed her bankruptcy petition on October 26, 2006. Her Statement of Financial Affairs reflected income of $43,147 in 2004, and $56,516 in 2005, both of which put her above the median family income for a family of one in Kansas. Within the six months prior to filing, however, she took a buyout from her then employer, which caused her April 2006 gross income to total $11,990.03, and her May 2006 gross income to total $15,356.42 – over

three times her previous regular monthly income. Because of this buyout, her "current monthly income," (hereafter "CMI") as defined by 11 U.S.C. § 101(10A), was skewed upwards to $64,124 per annum, or $5,343 a month.

In reality, at the time of filing, Debtor was no longer employed by the employer from whom she had earned the above-median income wages. Debtor's Schedule I reflects net monthly income of $1,922, which, annualized, equals $23,064 – considerably below the median income in Kansas.[3] Debtor's Schedule J reflects expenses of $1,772.97. A comparison of those two Schedules thus showed $149 excess income. Debtor's plan proposes to pay $144 per month for 36 months.

In contrast, through use of the expense deductions now required of above-median income debtors, Debtor's Form B22C reflects monthly expenses of $4,228. After subtracting Debtor's monthly expenses from her CMI, Line 58 of Form B22C indicates Debtor has "Monthly Disposable Income Under §1325(b)(2)" of $1,114 to pay to unsecured creditors.[4] Obviously, because Debtor's income precipitously dropped since the six month look-back period, Debtor

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[3] The median income for a family of one in Kansas is $36,631.00, according to the U.S. Census Bureau, Housing and Household Economic Statistics Division.

[4] The Trustee calculates that a payment of $756 each month, for 60 months, would pay her creditors in full.

is unable to pay $1,114 per month to the Trustee, which amount represents almost 60% of Debtor's actual gross monthly income.

Although the Trustee acknowledges that Debtor would be unable to cash flow a plan at the $1,114 rate, that Debtor can only afford to pay the amount her plan proposes to pay, and makes no argument that her reduction in income occurred in bad faith, the Trustee nevertheless filed an objection to confirmation[5] solely on the basis that "[t]he Plan fails to provide that all of the Debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors under the plan as required by 11 U.S.C. § 1325." In his brief, he argues that " . . . 1325(b)(2) and Form B22C provide a rigid, mechanical test by which a debtor's projected disposable income is to be determined, despite the potential for a different result under an 'I minus J' analysis."[6]

B. Avila

Debtor, Jesus Avila, and the Trustee have also agreed to submit the issues under stipulated facts. Debtor filed his bankruptcy petition on December 8, 2006. Debtor's Form B22C shows that he is also an above-median income debtor based on the § 101(10A)

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[5] Doc. 15.

[6] Doc. 32.

definition of current monthly income. During the six-month look back period, Debtor held one full time and two part time jobs, resulting in CMI of $5,686. At the time of filing, however, he had quit his two part time jobs because of the stress created by working over 14 hours a day.[7] His "actual" income, as shown on Schedule I, was $5,200, which is still above-median income.

Debtor's Form B22C reflected expenses of $5,531.57, resulting in $155.09 monthly disposable income on Line 58. The expenses Debtor listed on Schedule J, however, totaled $3,489, leaving net excess disposable income of $411, after deducting those expenses from the actual income shown on Schedule I. Debtor's plan proposes payment of $195 two times a month, the exact amount of "excess income" noted on Schedule J, which is $256 per month more than the "rigid, mechanical test" advocated by the Trustee. Since creditors will receive more under Debtor's plan than that mechanical test would require, the Trustee obviously does not object to the higher amount.

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[7] In fact, the Court was advised at the confirmation hearing held April 26, 2007 that Debtor Avila had just died. Debtor's counsel said he had not been able to discuss whether Debtor's heirs might wish to complete his bankruptcy, which is possible under Fed. R. Bankr. P. 1016, but indicated a decision by the Court on these pending issues would assist him in advising Debtor's heirs whether completion would be in their best interest. Accordingly, the Court announced its decision orally on April 26, 2007, and indicated this written decision would follow.

Although Debtor's plan provides that the "commitment period is 60 months," it also provides that "[t]he commitment period does not deal with the length of the plan. In so providing, Debtor does not commit to making payments for a full 60 months, or to payment of unsecured creditors." The Trustee's objection states that "Debtor does not propose to pay the net result of Form B22C to unsecured creditors. Trustee contends that changes in circumstances cannot modify this result as Congress' intent was to remove from the Court, Trustee and Counsel the discretion to effect a number at odds with these computations."

The Trustee's position is that 11 U.S.C. § 1325(b)(3) requires, for above-median income debtors, that the court look only at the dollar amount contained on Line 58 of Form B22C, and if it is a positive number, that the debtor must then pay that amount to unsecured creditors over not less than 60 months. As in Lanning, the Trustee does not dispute that Debtor can only afford to pay the amount his plan proposes to pay, or allege that the reduction in income occurred in bad faith.

II. Discussion

In its passage of BAPCPA, Congress clearly intended that debtors with the financial ability to pay something to unsecured creditors should be required

to do so.[8] To implement this goal, debtors wishing to liquidate their assets under Chapter 7 are now subject to a "means test."[9] National and regional expense standards used by the Internal Revenue Service in determining a taxpayer's ability to repay delinquent taxes[10] are used to determine whether debtors have the ability to repay a portion of their debts. If it is determined, pursuant to § 707(b)(2)(A)(I), that a debtor can pay the stated percentage or amount of his or her debt, the debtor must choose to either convert his or her case, or suffer its dismissal. The means test is incorporated into Chapter 13 proceedings to determine what amount a debtor must pay to unsecured creditors, and over what period of time.[11]

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[8] The means test was intended to "ensure that those who can afford to repay some portion of their unsecured debts [be] required to do so." 151 Cong. Rec. S2462-02 (March 10, 2005).

[9] 11 U.S.C. § 707(b).

[10] "Collection Financial Standards" used by Revenue Agents in assessing Offers in Compromise can be found at www.irs.gov/businesses/small/article/0,,id=104627,00.html. The National Standards reflect amounts that IRS has deemed reasonable in the five categories of food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous expenses. IRS' Local Standards apply to transportation and housing costs (including utility expenses), which vary more by region than the prior five expense areas. All standards except miscellaneous are derived from the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (CES). The miscellaneous standard has been established by the IRS.

[11] Section 1325(b)(1)(B).

A. The Statutory Predicate (and Predicament)[12]

To answer the questions raised by these two cases, the Court is required to follow the plain meaning of the relevant statutes,[13] unless to do so would lead to an absurd or futile result.[14] The Court must consider the statute as a whole, interpreting it in a fashion that the entire Code can function in a workable manner.[15] Pivotal to this Court's decision is how to interpret the undefined phrase "projected disposal

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[12] This is the name that the Bankruptcy Appellate Panel for the First Circuit aptly titled its section analyzing the pertinent law. *In re Kibbe*, ___ B.R. ___, 2007 WL 512753 at *2 (1st Cir. BAP 2007) (holding that Congress intended the term "projected disposable income" for below-median income debtors to be forward-looking and reality-based, not grounded in blind adherence to any artificial formulation).

[13] *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (When the language of a statute is plain, the sole function of the courts is to enforce the statute according to its terms unless the disposition required by the text is absurd); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (finding that where . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotation marks and citation omitted)

[14] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966) (finding that when the plain meaning "has led to absurd or futile results" courts have reasonably followed the purpose, rather than the literal words), quoting *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940).

[15] *See United States v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (noting that statutory construction is a "holistic endeavor.")

income" found in § 1325(b)(1)(B), which implicates several sections of the recently amended Bankruptcy Code.

The sections that must be considered are § 101(10A) and §§ 1325(b)(1)-1325(b)(4). Section 1325(b)(1)(B) is the starting point for this analysis; it provides

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –
>
> > (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Although the term "projected disposable income" is not defined, "disposable income" is defined, as follows:

> For purposes of this subsection, "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended

> (A)(I) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
>
> (ii) for charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.[16]

This statute then requires us to look at the definition of "current monthly income," which is defined, in §101(10A), as essentially " . . . the average monthly income from all sources that the debtor receives . . . during the 6-month period . . . " before filing. In other words, "current monthly income" is a snapshot of a debtor's income for the six-month period prior to the filing of his or her bankruptcy petition; it is not the actual, monthly income the debtor has available to fund a Chapter 13 plan when the bankruptcy is filed.

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[16] Section 1325(b)(2).

Subsection 1325(b)(3) is also relevant to this analysis, because it defines what amounts are "reasonably necessary to be expended" – i.e., what expenses are appropriate for an above-median debtor, under §1325(b)(2). It provides that appropriate expenses shall be determined in accordance with § 707(b)(2)(A) and (B), which limits expenses to the categories and amounts specified therein. The expenses allowed are those contained in the National and Local Standards established by the Internal Revenue Service, as well as some actual expenses in the categories specified by the Internal Revenue Service as "Other Necessary Expenses."

Finally, § 1325(b)(4) defines "applicable commitment period" as three years, or not less than five years for an above-median debtor, unless all allowed unsecured creditors are paid in full earlier.

1. Income

In construing these code sections together to determine how to calculate "projected disposable income" for above-median debtors, most courts have focused on whether the undefined term, "projected disposable income," has the same meaning as the defined term, "disposable income."[17] In other words,

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[17] *In re Edmondson*, ___ B.R. ___, 2007 WL 656457 (Bankr. D. N.M. 2007), citing *In re Teixeira*, 358 B.R. 484 (Bankr. D. N.H. 2006) ("The issue before the Court is whether the 'disposable income' figure resulting from section 1325(b)(2)'s formula is

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did Congress mean the word "projected" to add anything to its definition of "disposable income?" Two competing interpretations have emerged, and interestingly, both claim their opposite conclusions are supported by the plain meaning of the relevant statutes.

The first camp reasons that the addition of the word "projected" to the defined phrase "disposable income" "suggests that Congress intended to refer to the income actually to be received by the debtor during the commitment period, rather than the income received during the six-month look back period prior to filing.[18] Courts adopting this view

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also the Debtor's 'projected disposable income' that she is required to pay under section 1325(b)(1)(B)."); *In re Slusher*, 359 B.R. 290 (Bankr. D. Nev. 2007) (same).

[18] *See e.g., In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006) and *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006) (finding that term "projected disposable income" must be based on anticipated income during plan, not merely average of prepetition income, otherwise, a debtor could time the filing and change the distribution to creditors). *See also In re Pak*, 357 B.R. 549 (Bankr. N.D. Cal. 2006) ("In determining whether a plan provides all of the debtor's 'projected monthly income,' a court should attempt to predict what the debtor's disposable income during the term of the plan will be, using the definition of 'current monthly income' set forth in 11 U.S.C. § 101(10A)"); *In re Casey*, 356 B.R. 519 (Bankr. E.D. Wash. 2006) ("the word 'projected' . . . requires a court to examine anticipated disposable income rather than historical disposable income, estimated disposable income, or some other type of disposable income"); *In re Bossie*, 2006 WL 3703203 at *2 (Bankr. D. Alaska 2006) (court refused to confirm plan "because, at [that] time, there [was] insufficient evidence to calculate [the debtors'] anticipated

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opine that it is appropriate for courts to consider each debtors' actual income, as shown on Schedule I, to determine what they can realistically pay over the life of a plan when there has been a substantial change in circumstances that Form B22C could not, or did not, contemplate. These courts also rely on the maxim of statutory construction that when Congress includes particular language in one section of a statute, but omits it in another, Congress must have intended different meanings.[19] Thus, they argue that

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or projected disposable income" and required the debtors to "present specific evidence to show that the numbers reflected on form [B]22C are inaccurate projections of their future finances"); *In re Kibbe*, 2007 WL 512753 at *5 (holding that [one] . . . camp "provides a critical meaning to the term "projected" which the former would dwarf."); *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga.2006) (holding in case where debtor's income had precipitously dropped because he could not work due to a heart problem, that "projected disposable income" means something different than "disposable income."); *In re Watson*, ___ B.R. ___, 2007 WL 1086582 (Bankr. D. Md. 2007) (following *Jass*, and holding that with admissible evidence, a party may demonstrate "a substantial change in circumstance such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future, and noting if the presumption is rebutted, a projected budget based upon the evidence, reflecting projected earnings and projected reasonable necessary expenses, will govern the determination of "projected disposable income" for purposes of confirmation of the plan).

[19] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (holding Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another); *In re Kibbe*, 2007 WL 512753 at *9 (relying on the "time-honored tenet that '[a]ll words and provisions of a statute are intended to have meaning and are to be given effect,

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"projected disposable income" was intended to mean something different than "disposable income."

The other camp holds that Congress intended to, and did, adopt a specific test to be rigidly applied for above-median income debtors, that the test is codified by completion of Form B22C, and that debtors, trustees, and the Court are bound by the mathematical calculations resulting from completion of Form B22C in formulating any plan, regardless of any change in circumstances.[20] The courts adopting this reasoning

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and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous' ") (citations omitted).

[20] *See, e.g., In re Hanks,* ___ B.R. ___, 2007 WL 60812 (Bankr. D. Utah 2007); *In re Alexander,* 344 B.R. 742 (Bankr. E.D.N.C. 2006) (noting that because Congress was expressly warned of the anomalous result caused by strict use of B22C formula, and nevertheless elected to adopt § 1325(b)(2), this alert, followed by the legislature's nonresponse, supports presumption of legislative awareness and intent); *In re Barr,* 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006) (holding that to arrive at "projected disposable income," one simply takes the calculation mandated by § 1325(b)(2) [using Form B22C] and does the math, finding that the word "projected" is a multiplier for the term "disposable income"); *In re Miller,* ___ B.R. ___, 2007 WL 128790 at *10 (Bankr. N.D. Ala. 2007) (holding B22C is dispositive of above-median income debtor's income); *In re Trammer,* 355 B.R. 234 (Bankr. D. Mont. 2006) (holding that projected disposable income determined by means test is not merely a presumptive number courts can adjust); *In re Kolb,* ___ B.R. ___, 2007 WL 960135 (Bankr. S.D. Ohio 2007) (acknowledging that many debtors will never be able to propose a confirmable plan given their actual income and expenses, but holding this "is the unfortunate result of a congressionally-created system that uses rigid formulas to calculate a debtor's chapter 13 plan payments

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suggest that one must not isolate the word "projected" and inflate its importance, but instead, that the courts' new role is to simply confirm the math on Form B22C and require debtors pay the net number over the proper period of time, without more.

This Court respectfully agrees with the majority of courts, which have found that the term "projected" is a forward-looking concept that not only allows, but requires, this Court to consider at confirmation the debtor's actual income as it is reported on Schedule I (Official Form 6I, revised 10/06), as well as any reasonably anticipated changes in that income during the life of the proposed Chapter 13 plan.[21] First, Congress' reference in § 1325(b)(1)(B) to *projected* disposable income *to be received* in the applicable commitment period would be superfluous if the historical average was the start and end of the equation. In fact, Schedule I specifically calls for debtors to provide an "[e]stimate of average or projected monthly income at time case filed," as well as to

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rather than considering a debtor's present financial reality and ability to pay.")

[21] The Court agrees with *In re Kibbe*, 2007 WL 512753 that to the extent the definition of "disposable income" contained in § 101(10A)(B) or § 1325(b)(2) excludes certain income (such as Social Security benefits, payments to victims of war crimes, payments to victims of terrorism, certain child support, foster care or disability payments), and those items are reflected on Schedule I, the Court should also exclude those items from Schedule I in determining "projected disposable income," where relevant. *Id.* at *8.

include estimated "monthly overtime," and to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document."[22] In other words, Schedule I tries to capture what income debtors actually will have to fund a plan.

Second, as the *Hardacre*[23] court noted, we cannot minimize Congress' insertion of the word "projected" before the words "disposable income" in the Chapter 13 confirmation context. Third, § 1325(b)(1) requires us to make the determination whether the debtor is committing all of his or her *projected* disposable income "as of the effective date of the plan." As noted, Schedule I assists courts in determining whether the plan is properly committing all this income, and clearly calls for the Court to consider income to be received during the life of the plan.

Fourth, this Court respectfully suggests that the alternative holding leads to absurd results that are at odds with both congressional purpose and common sense. The facts in these two cases, of Stephanie

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[22] Line 17. The Court assumes the debtor is only asked to "predict" increases and decreases in income for one year as a recognition that it becomes more difficult to accurately predict such changes for later years. The Court acknowledges that official forms do not trump statutes, *see In re Lenton*, 358 B.R. 651, 657 n. 14 (Bankr. E.D. Pa. 2006) (noting that when an Official Form is in conflict with a federal statute, the statute must control), but the forms do support this interpretation.

[23] *In re Hardacre*, 338 B.R. at 723.

Lanning and Jesus Avila, demonstrate this point. Rigid adherence to the Form B22C formula in these cases, where both Debtors' respective incomes dropped significantly from their pre-petition monthly average, would prevent such debtors from ever being able to file a feasible and confirmable Chapter 13 repayment plan. This Court agrees with the court in *Kibbe* when it noted that such a "statutory indifference to the change [in income] at confirmation would doom any chapter 13 plan."[24]

Accordingly, in those cases where the debtor's income at confirmation has not appreciably changed from the historical number contained in Form B22C, Schedule I will contain essentially the same "income" number. In cases like Avila's and Lanning's, however, where a debtor's financial situation has significantly deteriorated over the six months prior to filing, strict adherence to the net results of Form B22C would result in the anomalous situation where those who most need bankruptcy protection would be precluded from seeking it. Experience shows that individuals who lose jobs, or who have a sudden (albeit temporary) reduction in income as a result of a strike, layoff, medical condition for them or a dependent requiring time off work, and the like, are among those who most frequently seek Chapter 13 protection, in an attempt to save homes and cars for which they have failed to make timely payments due to the

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[24] *In re Kibbe*, 2007 WL 512753 at *10.

reduction in income. If these debtors are forced to file quickly after the income reduction (when their "current monthly income" is still above-median as averaged over the prior six months), in an attempt to forestall the repossession of a car, or the foreclosure of a home, they will, as a class, be denied the opportunity to reorganize under Chapter 13.[25]

This Court will not adopt a reading of the statute that results in this absurd result – a result that would effectively preclude Chapter 13 relief for those most in need. Furthermore, the reading of the statute preferred by the minority, which minimizes the importance of the word "projected," similarly results in an absurd result when a debtor's financial picture has appreciably improved since the six-month look back period. The following example demonstrates that situation:

> A debtor takes unpaid family leave for the first two months of the historical six-month look back period required by §101(10A), but then returns to her $6,000 a month job for

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[25] They might also be denied relief under Chapter 7, as a presumption of abuse could well arise under § 707(b)(2). They would then have to either convert to Chapter 13 (which would be futile because they could not propose a feasible plan) or dismiss their Chapter 7. Again, the scant legislative history would indicate this was likely not the intent of Congress. *See* 151 Cong. Rec. 2462-02 at S2470, 2005 WL 562943 (March 10, 2005) (statement of Senator Nelson: "It is important to note that no American will be denied access to the bankruptcy system under these reforms.").

> the remaining four months. She would still be an above-median income debtor, but her Form B22C would only show monthly income of $4,000. The net dividend payable to unsecured creditors, shown on Line 58 of Form B22C, would almost inevitably be considerably less than her actual ability to pay.

Nevertheless, the Court would be required to confirm the plan, even though the debtor was not paying what she was able to pay her unsecured creditors.

Accordingly, this Court follows the *In re Kibbe*[26] line of cases, which hold that the income shown on Form B22C is the appropriate starting point for the Court's inquiry into whether a debtor is in compliance with the "projected disposable income" requirement of § 1325. "The Court will presume that the number resulting from Form B22C is the debtor's "projected disposable income" unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future."[27]

2. Expenses

The next issue the Court must decide is whether it should subtract the expenses shown on Form B22C

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[26] 2007 WL 512753 at *8.

[27] *Jass*, 340 B.R. at 418-19. *See also In re Moore*, ___ B.R. ___, 2007 WL 1111267 (Bankr. D. Kan. 2007).

– some of which are formulaic and some of which are "actual," or those shown on Schedule J, which are allegedly "actual"[28] expenses, from the appropriate income number, to determine the dividend that should be paid to unsecured creditors by above-median income debtors under § 1325(b)(1)(B). The plain language of § 1325(b)(3) summarily decides the issue.

That statute requires that "[a]mounts reasonably necessary to be expended under paragraph (2) *shall* be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)."[29] Section 707(b)(2)(A)(ii)(I)-(V) establishes very definitive deductions from income, based on Internal Revenue Service National and Local Standards as well as on some of a debtor's actual monthly expenses for "the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor

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[28] Judge Berger's experience, outlined in *In re Moore*, dovetails with this Court's experience, when he notes that " . . . Schedules I and J more often than not are an unrealistic projection of future income and costs of living. Chapter 13 debtors ultimately experience income and expenses widely divergent from their initial projection. Reality is that changes in income and expenses are almost certain to occur over a five-year period. A debtor's failure to present a realistic budget sets him up for a default in plan payments at the outset of his plan. Reliance on Schedules I and J for a true projection of the debtor's future cash flow is illusory at best, even if it is the debtor's best estimate of future income and expenses." *Moore*, 2007 WL 1111267 at *2.

[29] Emphasis added.

resides. . . ."[30] In this statute, Congress expressly contrasted when the standardized (or "applicable") allowance must be used, and when actual expenses were to be used, in determining "disposable income."

This demonstrates that Congress clearly understood the difference between actual expenses and "standardized" expenses, and elected to establish a means test formula that used a mix of those two. Accordingly, if the Court were to use Schedule J (which reflects actual expenses in every expense category), in determining which expenses to deduct from income, it would be reading all references to National and Local IRS Standards out of the relevant statutes, which of course it cannot do.[31] This Court finds that above-median income debtors must deduct from income the expenses they itemize on Form B22C to arrive at the minimum amount that they must pay to unsecured creditors, except for limited exceptions not expressly argued here.[32]

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[30] *Id.* at § 707(b)(2)(A)(ii)(I), such as health insurance, disability insurance, and health savings account expenses.

[31] *See Nutraceutical Corp. v. Von Eschenbach,* 459 F.3d 1033 (10th Cir. 2006) (noting that the rule against surplusage "encourages courts to give meaning to every word used in a statute to recognize congressional intent. In effect, this rule embodies the belief that Congress would not have included superfluous language.").

[32] As noted *In re Hanks,* 2007 WL 60812 at *5, because § 1325(b)(3) incorporates § 707(b)(A) and (B), courts do have a very limited ability to adjust both income and expenses under § 707(b)(2)(B)(I) based on a showing of "special circumstances,

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B. Duration of plan payments

The final issue this Court must decide is whether the plans of Debtors Avila and Lanning can be confirmed in light of the inference or provision in each plan that their plans will not necessarily run a full 60 months. Again, this question is easily answered by the plain meaning of § 1325(b)(1)(B). The Code does not require a set dividend to unsecured creditors, only a minimum number of months for debtors to commit their projected disposable income to payment into their Chapter 13 plan.[33] Neither plan satisfies this requirement.

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such as serious medical condition or a call or order to active duty in the Armed Forces . . . for which there is no reasonable alternative." Although the Trustee here stipulated that there had been a change in circumstances in each of these cases, for future case, the Court believes the procedure set forth in *In re Jass* is logical, and required by the statute. *Jass* notes that "[t]he inquiry under § 707(b)(2)(B) into whether "special circumstances" exist in a debtor's case is similar to the Court's inquiry into whether a substantial change in circumstances exists. Thus, the Court will look to the analysis required by § 707(b)(2)(B) for guidance in determining whether a debtor has met his or her burden to show a substantial change in circumstances. A debtor attempting to meet this burden should present documentation similar to that required by § 707(b)(2)(B)." *In re Jass*, 340 B.R. at 418.

[33] *See In re Beckerle*, 06-20572 (Bankr. D. Kan. April 13, 2007) (holding language requires a minimum number of years for debtors to commit their projected disposable income – whatever the amount may be), relying on *In re Davis*, 348 B.R. 449, 458 (Bankr. E.D. Mich. 2006).

The Court incorporates its reasoning contained in *In re Pohl,*[34] which decision is being entered at or about the same time as this decision.[35] As *Pohl* explains, the applicable commitment period for above-median income debtors is 60 months (unless their plan earlier pays unsecured creditors in full), even when the amount on B22C or Schedule I, minus the expenses shown on Form B22C, is a negative number, for several reasons.

First, the language of § 1325(b)(1) and (4) supports a temporal interpretation of "applicable commitment period, because those subsections use words with a temporal meaning, such as "period," "commitment" and "years," and don't use words such as "when multiplied by 12," as is used earlier in the same

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[34] Case No. 06-41236. The decision in *Pohl* is being entered at or about the time of this decision. Debtors Pohl had no income other than social security income; they thus were deemed, pursuant to § 101(10A), to have zero income and were categorized as below-median income debtors. Nevertheless, this Court held that if they chose to pay into a plan income that is statutorily excludable, in order to propound a feasible plan, they must pay that amount for a full 36 months.

[35] *See also In re Moore,* 2007 WL 1111267 (holding that while § 707(b)(2)(B)(I) gives courts the discretion to consider "special circumstances" relevant to disposable income and expenses, no provision of the Code provides similar discretion regarding calculation of the applicable commitment period; thus an above-median income debtor cannot reduce that period based solely on a post-petition change in income); *In re Grady,* 343 B.R. 747, 749 (Bankr. N.D. Ga. 2006) (finding that fact debtors suffered a post-petition loss of income could not serve to reduce the term of their plan).

statute, or "multiplied by 60," as used in § 707(b)(2)(A)(I). Congress clearly knows how to use a multiplier when it so intends, and chose not to do so in § 1325(b)(4).

Second, a "monetary" or "multiplier" interpretation of "applicable commitment period" is a significant departure from pre-BAPCPA practice, which required a minimum period of payments, that is simply not justified by the language or structure of the statute, or by the admittedly scant legislative history.[36] BAPCPA's revision of § 1325 has not changed this tenet of pre-BAPCPA practice.[37] Third, adoption of the "monetary" or "multiplier" theory would allow debtors to cash out unsecured creditors at a discount at any time, without requiring a debtor make his or her best efforts over some required period of time to repay creditors.

Fourth, a holding that a "monetary" or "multiplier" theory is the correct view would be inconsistent with the Code's future reporting requirements for debtors, such as the obligation to turnover post-confirmation tax returns to the Trustee and to project reasonably anticipated income increases in the 12 months following filing. There would be no need to

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[36] *In re Schanuth*, 342 B.R. 601 (Bankr. W.D. Mo. 2006), *citing* House Report, which indicates even the title of the report referenced Chapter 13 plans having a five-year duration in certain cases.

[37] *In re Davis*, 348 B.R. at 455-56 and *In re Schanuth*, 342 B.R. at 607.

engage in such reporting if regardless of the information gleaned, debtors could exit their Chapter 13 plan whenever they could pay off secured and priority claims.

Finally, what little legislative history we have supports that Congress believed that requiring debtors to make plan payments for 36-60 months would assist debtors in acquiring the financial discipline they would need to really get a fresh start, post-discharge. Senator Sessions, one of the proponents of the legislation, stated that

> "[i]f a debtor files under Chapter 13 and learns how to manage money under a structured repayment plan that requires some discipline, the debtor learns financial responsibility and should be able to avoid future financial turmoil. Chapter 13 bankruptcies allow debtors to keep their assets and pay back a portion of their debts over a 5 year period. In exchange, the remaining portions of their debt are discharged and the debtor gets a fresh start."[38]

To obtain a confirmable plan, both Lanning and Avila will be required to make payments over 60 months.

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[38] 151 Cong. Rec. S2462-02 at S2472 -S2473, 2005 WL 562943 (March 10, 2005) (statement of Senator Sessions).

III. Application to Debtor Lanning

Because Debtor Lanning's Schedule I showed actual income of $1,922, and her B22C showed expenses of $4,228, the means test would result in Debtor not having to pay anything to unsecured creditors, because the remainder is a negative number. If she pays zero, however, she cannot formulate a feasible plan[39] that meets all the other requirements of § 1325(a). Nothing prevents debtors from electing to pay more than the statutory means test requires, in order to meet the requirement that a plan must be feasible, so long as the payment continues for 60 months. Accordingly, since Debtor Lanning has proposed to pay $144 per month, her plan is confirmable so long as it continues 60 months.

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[39] Section 1325(a)(6). *See also In re Miller*, 2007 WL 128790 at *6 (holding that "[f]or any number of reasons, because a debtor has income not counted in the definition of current monthly income [such as Social Security income], has housing or transportation expenses less than the permissible IRS deductions, has huge secured debt for luxury items, that bizarrely, may be deducted in full as a reasonable and necessary expense, or wishes to continue to contribute to or repay a loan to her 401(k) plan rather than pay her unsecured creditors, a debtor under the new "disposable income" test may show a zero or negative number, yet may be able to make the required showing that she actually has enough income to fund a confirmable plan.")

IV. Application to Debtor Avila

Similarly, Debtor Avila's Schedule I showed actual income of $5,200 and his B22C showed expenses of $5,531.57, resulting in the finding that nothing need be paid to unsecured creditors. The Trustee has not objected that Debtor's plan to pay $195 biweekly is not feasible, only that his plan must run 60 months. Accordingly, the Court may well confirm the plan if his heirs wish to proceed, and if the standard confirmation order is modified to require payment for a full 60 months.

V. Conclusion

Debtors' plans cannot be confirmed because they allow for the possibility of discharge without making payments over five years, in violation of 11 U.S.C. § 1325(b)(4). The Court, therefore, sustains the Trustee's objections, but will allow Debtors 30 days (from April 26, 2007, when this basic holding was orally announced at the docket) to file and provide notice of an amended plan that is consistent with this opinion. Alternatively, if Debtors elect to notify the Trustee and the Court that they will allow the standard confirmation order to reflect that each plan will run five years, also by May 26, 2007, they will not be required to file and provide notice of an amended plan. These cases will be next heard on the Court's May 30, 2007 at 1:30 p.m. confirmation docket.

This decision constitutes the Court's findings of fact and conclusions of law for purposes of Bankruptcy Rule 7052. A separate order sustaining the Trustee's objections will be entered pursuant to Fed. R. Bank. P. 9021.

Relevant Provisions of the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. (In relevant part only.)

11 U.S.C. § 101*. Definitions.

(10A) The term "current monthly income" –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits

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* Non-relevant subsections have been omitted.

received under the Social Security Act, payments to victims of war crimes, or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

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11 U.S.C. § 707*. Dismissal of a case or conversion to a case under chapter 11 or 13.

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

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* Non-relevant subsections have been omitted.

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of –

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or

(II) $10,000.

(ii)(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the

debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of –

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary

residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide –

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that

additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of –

(I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or

(II) $10,000.

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11 U.S.C. § 1129*. Confirmation of plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan –

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

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* Non-relevant subsections have been omitted.

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

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11 U.S.C. § 1323. Modification of plan before confirmation.

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

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11 U.S.C. § 1325*. Confirmation of plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

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* Non-relevant subsections have been omitted.

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of the expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $575 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than –

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $575 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in

full of all allowed unsecured claims over a shorter period.

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11 U.S.C. § 1329. Modification of plan after confirmation.

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that –

(A) such expenses are reasonable and necessary;

(B)(i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title;

and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

SUPPLEMENTAL APPENDIX

Supreme Court, U.S.
FILED

No. 08 998 FEB 3 - 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL APPENDIX

JAN HAMILTON, Trustee
Counsel of Record
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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse	$	$
8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act: Debtor $ Spouse $	$	$

9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance. Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.		$

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

12	**Enter the amount from Line 11.**	$
13	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter on Line 13 the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ b. $ c. $ Total and enter on Line 13.	$
14	**Subtract Line 13 from Line 12 and enter the result.**	$
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

18	**Enter the amount from Line 11.**	$

19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero. a. $ b. $ c. $ Total and enter on Line 19.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24A	**National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.** Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable household size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
24B	**National Standards: health care.** Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the number of members of your household who are under 65 years of age, and enter in Line b2 the number of members of your household who are 65 years of age or older. (The total number of household members must be the same as the number stated in Line 16b.) Multiply Line a1 by Line b1 to obtain a total amount for household members under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for household members 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.	$

Household members under 65 years of age			Household members 65 years of age or older		
a1.	Allowance per member		a2.	Allowance per member	
b1.	Number of members		b2.	Number of members	
c1.	Subtotal		c2.	Subtotal	

25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and household size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

25B **Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and household size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**

a.	IRS Housing and Utilities Standards; mortgage/rent expense	$	
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$	
c.	Net mortgage/rental expense	Subtract Line b from Line a.	$

26 **Local Standards: housing and utilities; adjustment.** If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

_____

_____ $

27A **Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more.

If you checked 0, enter on Line 27A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) $

27B **Local Standards: transportation; additional public transportation expense.** If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) $

28 **Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more.

Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs	$	
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47	$	
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.	$

29	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28. Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs — $ b. Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47 — $ c. Net ownership/lease expense for Vehicle 2 — Subtract Line b from Line a.	$
30	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	$
31	**Other Necessary Expenses: involuntary deductions for employment.** Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as voluntary 401(k) contributions.**	$
32	**Other Necessary Expenses: life insurance.** Enter total average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
33	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. **Do not include payments on past due obligations included in Line 49.**	$
34	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
35	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
36	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. **Do not include payments for health insurance or health savings accounts listed in Line 39.**	$
37	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
38	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 24-37

39	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 39 **If you do not actually expend this total amount**, state your actual total average monthly expenditures in the space below: $ _____	$
40	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**	$
41	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
42	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
43	**Education expenses for dependent children under 18.** Enter the total average monthly expenses that you actually incur, not to exceed $137.50 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$
44	**Additional food and clothing expense.** Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must demonstrate that the additional amount claimed is reasonable and necessary.**	$
45	**Charitable contributions.** Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.**	$
46	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45.	$

Subpart C: Deductions for Debt Payment

47 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.

	Name of Creditor	Property Securing the Debt	Average Monthly Payment	Does payment include taxes or insurance?
a.			$	☐ yes ☐ no
b.			$	☐ yes ☐ no
c.			$	☐ yes ☐ no
			Total: Add Lines a, b, and c	$

48	**Other payments on secured claims.** If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.	

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c

		$
49	**Payments on prepetition priority claims.** Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. **Do not include current obligations, such as those set out in Line 33.**	$
50	**Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.	

a.	Projected average monthly chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of chapter 13 case	Total: Multiply Lines a and b

		$
51	**Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50.	$

Subpart D: Total Deductions from Income

52	**Total of all deductions from income.** Enter the total of Lines 38, 46, and 51.	$

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53	**Total current monthly income.** Enter the amount from Line 20.	$
54	**Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.	$
55	**Qualified retirement deductions.** Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19).	$
56	**Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52.	$

Deduction for special circumstances. If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. **You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.**

57

	Nature of special circumstances	Amount of expense
a.		$
b.		$
c.		$
		Total: Add Lines a, b, and c

$

58 **Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result. $

59 **Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result. $

Part VI: ADDITIONAL EXPENSE CLAIMS

Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

60

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

Part VII: VERIFICATION

I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

61

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

AMICUS CURIAE BRIEF

No. 08-998

In the Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE, PETITIONER

v.

STEPHANIE KAY LANNING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Under Section 1325(b)(1)(B) of Title 11 of the United States Code, when a trustee or unsecured creditor objects to the confirmation of a debtor's Chapter 13 plan, the bankruptcy court can confirm that plan if "all of the debtor's projected disposable income to be received" during the plan period "will be applied to make payments to unsecured creditors under the plan." The debtor's "disposable income" is calculated by examining her monthly expenses when the Chapter 13 petition was filed and her average monthly income during the six-month period before the petition was filed. The question presented is as follows:

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

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In the Supreme Court of the United States

No. 08-998

JAN HAMILTON, CHAPTER 13 TRUSTEE, PETITIONER

v.

STEPHANIE KAY LANNING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari.

STATEMENT

1. a. Chapter 13 of the Bankruptcy Code provides for the adjustment of debts of an individual with regular income. 11 U.S.C. 1301 *et seq.* A debtor who files for bankruptcy under Chapter 13 remains in possession of her assets, and she typically receives a discharge of her debts only after she pays her creditors under a plan confirmed by the bankruptcy court. 11 U.S.C. 1306(b), 1321-1328.

If the trustee or an unsecured creditor objects to confirmation of a Chapter 13 debtor's plan, the court cannot confirm that plan

> unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. 1325(b)(1)(A)-(B). Thus, the bankruptcy court may confirm a contested Chapter 13 plan only if the debtor commits either to pay her unsecured creditors in full or to apply all of her "projected disposable income" during the plan period to paying those creditors.

b. This case concerns the proper method for calculating a debtor's "projected disposable income" during the plan period. Neither Section 1325 nor any other provision of the Bankruptcy Code defines the term "projected disposable income." Section 1325 does, however, define the term "disposable income." That definition was recently amended as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act), Pub. L. No. 109-8, 119 Stat. 23. Because petitioner's arguments depend in large measure on that amendment, it is important to understand the statutory scheme both before and after BAPCPA.

i. Before BAPCPA was enacted, Section 1325 defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to

be expended" for the debtor's "maintenance or support," "charitable contributions," or "business * * * expenditures." 11 U.S.C. 1325(b)(2)(A)-(B) (2000). Then as now, a debtor listed her monthly income on Schedule I and her monthly expenditures on Schedule J. See Fed. R. Bankr. P. Official Form 6, Schedules I-J (2000). Thus, to calculate a debtor's *current disposable income*, a bankruptcy court generally began with the monthly income listed on Schedule I and deducted any monthly expenditures listed on Schedule J that the court determined were reasonably necessary to support the debtor, to contribute to charity, or to operate the debtor's business.

Then, to calculate the debtor's *projected disposable income*, the court typically multiplied the debtor's current disposable income by the number of months in her plan. See, *e.g.*, *In re Killough*, 900 F.2d 61, 64 (5th Cir. 1990). In projecting disposable income, however, courts exercised discretion to consider any changes to the debtor's income or expenses that appeared likely to occur during the plan period. See, *e.g.*, *In re Petro*, 395 B.R. 369, 377 (B.A.P. 6th Cir. 2008) ("Prior to BAPCPA the schedules were a starting point and courts gave meaning to 'projected' and 'to be received' by taking into account a debtor['s] anticipated future income."); *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W.Va. Jan. 23, 2008) ("Of course, under pre-BAPCPA law, bankruptcy courts sometimes deviated from the debtor's income and expenses listed on Schedules I & J based on known increases or decreases in either income or expenses.").

ii. In BAPCPA, Congress amended the definition of "disposable income." Section 1325 now defines that term as "current monthly income received by the debtor

* * * less amounts reasonably necessary to be expended" for certain items. 11 U.S.C. 1325(b)(2). "[C]urrent monthly income" is defined, in turn, as the debtor's "average monthly income from all sources" during the six months preceding the filing. 11 U.S.C. 101(10A)(A)(i).[1] Although a debtor still files Schedules I and J, she also now files Official Form 22C, which requires her to calculate her current monthly income. See Fed. R. Bankr. P. Official Form 22C (2009); Pet. Supp. App. 1-8.[2] Thus, to calculate a debtor's monthly income under BAPCPA, a court no longer looks to a single month's income at the time of filing; rather, it looks to an historical average of the debtor's income during the six-month period before commencement of the case.

In addition to changing the method of calculating all debtors' monthly income, BAPCPA also changed the method of calculating some debtors' monthly expenses. If a debtor's current monthly income is below the median income of a comparably sized household in her State, the debtor may claim the same types of general expenses—*i.e.*, "maintenance or support" obligations, "charitable contributions," and "business * * * expenditures"—as she could before BAPCPA. 11 U.S.C.

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[1] A debtor is required to file a Schedule I listing her monthly income. See 11 U.S.C. 521(a)(1)(B)(ii). If the debtor complies with that requirement, her current monthly income is determined with reference to the six-month period preceding the filing. See 11 U.S.C. 101(10A)(A)(i). If the debtor does not file a Schedule I, in certain circumstances her current monthly income may be determined with reference to the six-month period preceding "the date on which current income is determined by the court." See 11 U.S.C. 101(10A)(A)(ii).

[2] Form B22C was an interim form that subsequently became Official Form 22C. Pet. App. 39. Respondent completed Form B22C, *ibid.*, but the Forms are virtually identical and they are referred to interchangeably herein.

1325(b)(2)(A)(i)-(ii) and (b)(2)(B). But if a debtor's current monthly income is above-median, she may claim only particular kinds of expenses in amounts specified under Section 707(b)(2) of the Bankruptcy Code. 11 U.S.C. 1325(b)(3)(A) (incorporating 11 U.S.C. 707(b)(2)).

Thus, BAPCPA amended the formulae for computing "disposable income" under Section 1325(b)(2) both by altering the manner in which a debtor's current income is determined and by establishing a new method of calculating an above-median debtor's expenses. The Act did not, however, address the method for calculating "projected disposable income" under Section 1325(b)(1)(B). See Pet. App. 50 ("BAPCPA linked 'disposable income' to Form B22C current monthly income, which is a historically based figure, but it left 'projected disposable income,' which had an established pre-BAPCPA treatment, alone."). Accordingly, the specific question presented in this case is whether, in projecting disposable income, courts retain the discretion that they exercised before BAPCPA to consider anticipated changes to the debtor's financial circumstances.

2. Respondent is a single woman with no children who resides in Kansas. On October 16, 2006, she filed a Chapter 13 petition to address $36,793.36 in unsecured debt. During the six-month period that preceded her filing, respondent received a one-time buyout from her former employer that increased her monthly gross income to $11,990.03 in April 2006 and $15,356.42 in May 2006. When respondent averaged her monthly income for April through September 2006 on Form 22C, her current monthly income amounted to $5,343.70. That figure placed her above the median income for a family of one in Kansas, so she calculated her expenses in ac-

cordance with Section 707(b)(2) of the Bankruptcy Code. Respondent's monthly expenses totaled $4,228.71, leaving her with monthly disposable income of $1,114.98 on her Form 22C. Pet. App. 4-5.

As a result of respondent's buyout, however, the "current monthly income" stated on her Form 22C was substantially greater than the monthly income that she could reasonably expect to earn during the plan period. On her Schedule I, she listed a monthly net income from new employment of $1,922, which placed her considerably below the state median income. On her Schedule J, she listed actual monthly expenses of $1,772.97, leaving her with monthly disposable income of $149.03. Based on that figure, respondent proposed a repayment plan of $144 per month for 36 months, or a total of $5,184. Pet. App. 4, 57.

Petitioner, the bankruptcy trustee, objected to confirmation of the plan. He argued that, because respondent's monthly disposable income on her Form 22C was $1,114.98, the plan did not satisfy Section 1325(b)(1)(B)'s requirement that "all of the debtor's projected disposable income to be received" in the plan period must "be applied to make payments to unsecured creditors." Petitioner contended that respondent's "projected disposable income" during the plan period was simply her monthly "disposable income" ($1,114.98) derived from the pre-plan figures, multiplied by the number of months in her plan (36), for a total "projected disposable income" of $40,139.28. Petitioner therefore proposed that the plan provide for monthly payments of $756, which would have repaid respondent's unsecured creditors in full over the life of the plan. Petitioner acknowledged, however, that respondent did not have the means to fund such a plan. Pet. App. 5-7.

3. a. Over petitioner's objection, the bankruptcy court confirmed the plan essentially as proposed by respondent. Pet. App. 54-82.[3] The court reasoned that "Congress' reference in § 1325(b)(1)(B) to *projected* disposable income *to be received* in the applicable commitment period would be superfluous if the historical average was the start and end of the equation." *Id.* at 69. The court further explained that Section 1325(b)(1)(B) requires a "determination whether the debtor is committing all of his or her projected disposable income 'as of the effective date of the plan,'" not as of the date of the petition. *Id.* at 70 (emphasis omitted). The court also concluded that petitioner's approach would "lead[] to absurd results that are at odds with both congressional purpose and common sense" because it would prevent debtors whose "incomes drop[] significantly from their pre-petition monthly average * * * from ever being able to file a feasible and confirmable Chapter 13 repayment plan." *Id.* at 70-71. The bankruptcy court therefore "agree[d] with the majority of courts, which have found that the term 'projected' is a forward-looking concept" that allows consideration of "any reasonably anticipated changes in [disposable] income during the life of the proposed Chapter 13 plan." *Id.* at 69.

b. The bankruptcy appellate panel affirmed. Pet. App. 33-53. After describing an existing split in authority on the question, *id.* at 44-50, the panel reasoned that although "BAPCPA linked 'disposable income' to Form B22C current monthly income, which is a historically

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[3] The bankruptcy court ordered that respondent's plan run for 60 months rather than the 36 months that respondent had proposed. Pet. App. 76-80. Respondent did not challenge that aspect of the bankruptcy court's decision, see *id.* at 11-12 & n.4, and it is not at issue in this Court.

based figure, * * * it left 'projected disposable income,' which had an established pre-BAPCPA treatment, alone." *Id.* at 50-51. Before BAPCPA's enactment, the panel explained, if bankruptcy courts "had reason to believe that [a debtor's] schedules did not accurately predict a debtor's actual ability to pay, other evidence was also considered." *Id.* at 51. The panel therefore concluded that although BAPCPA had modified the formulae for calculating a debtor's current disposable income, it had not "eliminate[d] the bankruptcy courts' discretion" to consider anticipated changes to a debtor's financial condition "where significant circumstances support doing so." *Ibid.*

c. The court of appeals affirmed. Pet. App. 1-32. After likewise surveying the split in authority on the question, *id.* at 16-23, the court concluded that petitioner's "mechanical approach"—multiplying a debtor's current "disposable income" by the number of months in her plan—is not consistent with the statutory text. *Id.* at 24-25. The court relied in particular on Section 1325(b)(1)(B)'s directive that "as of the effective date of the plan," all of the debtor's projected disposable income "to be received" during the plan period "will be applied to make payments to unsecured creditors." *Id.* at 25 (emphasis omitted). The court construed those three statutory phrases to "suggest[] consideration of the debtor's actual financial circumstances as of the effective date of the plan." *Ibid.* The court of appeals further concluded that the language of Form 22C and BAPCPA's legislative history confirmed a "forward-looking approach." *Id.* at 28-29. The court finally noted that the mechanical approach would foreclose bankruptcy relief for debtors like respondent whose post-filing income decreases, while allowing debtors whose

post-filing income increases to avoid paying creditors all that they are able. *Id.* at 31.

DISCUSSION

The text, structure, history, and purposes of Section 1325(b)(1)(B) indicate that in calculating "projected disposable income," the bankruptcy court may consider evidence indicating that the debtor's income or expenses during the plan period are likely to be different from her pre-petition income or expenses. Although the court of appeals correctly reached that conclusion, its decision deepens a pre-existing circuit conflict with the Ninth Circuit's decision in *In re Kagenveama*, 541 F.3d 868 (2008). This Court should grant the petition for a writ of certiorari to resolve the split among the circuits on this important and recurring legal issue.

A. In Projecting A Chapter 13 Debtor's Disposable Income, Courts May Consider Evidence Indicating That The Debtor's Financial Circumstances Are Likely To Change During The Plan Period

1. a. Section 1325 specifies a method for calculating a debtor's current "disposable income," but does not specify how that disposable income should be "projected" into the future. The Court therefore must look to the common and ordinary meaning of the term "projected." See *Rousey* v. *Jacoway*, 544 U.S. 320, 330 (2005). That adjective is derived from the verb "project," which ordinarily means "[t]o calculate, estimate, or predict (something in the future), based on present data or trends." *In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006) (quoting *American Heritage College Dictionary* 1115 (4th ed. 2002)); see *Merriam-Webster Collegiate Dictionary* 993 (11th ed. 2005) (defining the verb "project" as "to plan, figure, or estimate for the future,"

and the noun "projection" as "an estimate of future possibilities based on a current trend"); *The New Oxford American Dictionary* 1355 (2d ed. 2005) (defining the verb "project" as "[to] estimate or forecast (something) on the basis of present trends").

Congress's use of the term "projected" therefore indicates that it intended bankruptcy courts to forecast whether current trends would continue, *i.e.*, whether the debtor could reasonably expect to receive the same income, and incur the same expenses, during the plan period as prior to the filing of the bankruptcy petition. See *In re Nowlin*, 576 F.3d 258, 263 (5th Cir. 2009) ("[W]e interpret the phrase 'projected disposable income' to embrace a forward-looking view grounded in the present via the statutory definition of 'disposable income' premised on historical data."). The term "projected" in Section 1325(b)(1)(B) would be an odd choice of words if Congress intended nothing more than a rote mathematical calculation in which a debtor's current disposable income is multiplied by the number of months in the plan. "The word 'multiplied' is quite different from the word 'projected,'" *In re Kibbe*, 361 B.R. 302, 312 n.9 (B.A.P. 1st Cir. 2007), and Congress expressly required multiplication elsewhere in Section 1325 and the rest of the Bankruptcy Code. See, *e.g.*, 11 U.S.C. 1325(b)(3) (providing that debtor's current monthly income be "multiplied by 12" to determine whether debtor has above-median income).[4] That Congress re-

[4] See 11 U.S.C. 1325(b)(4)(A)(ii) (providing that debtor's current monthly income be "multiplied by 12" to determine whether debtor has above-median income); 11 U.S.C. 704(b)(2) (same); see also 11 U.S.C 707(b)(2)(A)(i) (providing that debtor's current monthly income be "multiplied by 60" to determine in part whether presumption of abuse applies); 11 U.S.C. 1322(d)(1)-(2) (providing that debtor's current

quired projection rather than multiplication in Section 1325(b)(1)(B) indicates that it did not intend future disposable income to be mechanically derived from current disposable income.

Contrary to petitioner's assertion (Pet. 19), the court of appeals' forward-looking approach does not ignore Section 1325's definition of "disposable income." That definition continues to serve the same two important purposes that the prior definition of that term served before BAPCPA was enacted. First, it specifies the types of revenue that the debtor must treat as income, and the types of expenses that the debtor may claim as reasonable and necessary. See Pet. App. 27. Although the process by which a debtor's future income is "projected" may involve predictive judgments rather than simple multiplication, those predictive judgments must focus on the types of revenue and expenses that are encompassed by Section 1325's definition of "disposable income." By contrast, if the term "disposable income" were undefined, bankruptcy courts would need to determine which types of revenue and expenses should be considered. The statutory definition thus constrains the bankruptcy courts' discretion in calculating "projected disposable income," even though it does not reduce that calculation to a mathematical formula.

Second, as a practical matter, Section 1325's definition of "disposable income" will often dictate what a debtor must contribute to a Chapter 13 plan in order to receive confirmation. In many cases, there is no reason to expect that the debtor's monthly income and expenses will be different during the plan period than they were

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monthly income be "multiplied by 12" to determine length of plan); 11 U.S.C. 1326(b)(3)(B)(ii) (providing that certain payments be "multiplied by 5 percent" to determine trustee compensation).

before the petition was filed. In those cases, projecting disposable income requires nothing more than multiplying a debtor's current disposable income by the number of months in her plan. But when the evidence indicates that the debtor's current income or expenses are likely to change during the plan period, "a debtor's 'disposable income' calculation on Form 22C is a starting point for determining 'projected disposable income,'" and "the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances." *In re Fredrickson*, 545 F.3d 642, 659 (8th Cir. 2008).

b. Interpreting the term "projected" to allow for consideration of changes in a debtor's financial circumstances also accords with the remainder of Section 1325(b)(1)(B). Section 1325(b)(1)(B) refers to "projected disposable income to be received in the applicable commitment period * * * [that] will be applied to make payments to unsecured creditors." The "applicable commitment period" is the plan period for repayment. By referring to projected disposable income that will "be received" and "be applied to make payments" during the plan period, Section 1325(b)(1)(B) "links 'projected disposable income' with the debtor's income actually received during the plan, and indicates a forward-looking orientation of the phrase." *In re Nowlin*, 576 F.3d at 263.[5]

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[5] Chapter 12 contains an analogous provision setting forth the conditions for confirming a contested repayment plan. See 11 U.S.C. 1225. The relevant language of Section 1225 is identical: a plan can be confirmed if "as of the effective date of the plan * * * the plan provides that all of the debtor's projected disposable income to be received" during the plan period "will be applied to make payments." 11 U.S.C. 1225(b)(1)(B).

Petitioner argues that respondent's "projected disposable income" within the meaning of the statute is $1,114.98 per month, even though petitioner concedes that respondent's actual disposable income during the plan period will be only $149.03 per month. See Pet. App. 4-6. Petitioner thus would make confirmation of the plan contingent on respondent's commitment to pay $756 per month for 36 months, even though nearly $607 of that amount will never "be received" and thus will never "be applied to make payments" during the plan period. See *In re Nowlin*, 576 F.3d at 263 ("If the debtor's income on Form 22C is artificially inflated * * * , a mechanical projection based on that number would include income the debtor may never receive."). In short, petitioner's proposed plan would require respondent to commit to repay creditors with income that she will never receive. That is not a natural reading of the statutory text.

Under Section 1325(b)(1)(B), moreover, a plan must provide that, "as of the effective date of the plan," all of the debtor's projected disposable income will be applied to repayment of unsecured creditors. Because a Chapter 13 plan is not binding on the debtor and other parties until it is confirmed, 11 U.S.C. 1327(a), "the effective date of the plan" is the date on which the plan is confirmed by the bankruptcy court. The requirement that bankruptcy courts determine a debtor's projected disposable income at the time of confirmation, which often occurs months after the time of filing, further indicates that Congress intended to allow for "consideration of evidence at the time of the plan's confirmation that may alter the historical calculation of disposable income on Form 22C." *In re Nowlin*, 576 F.3d at 263; see Pet. App. 25. By contrast, petitioner's mechanical approach

would preclude the bankruptcy court from considering not only changes in the debtor's financial circumstances that are demonstrably likely to occur during the plan period, but even changes that have already occurred between the pre-filing period and the date the confirmation decision is made.[6]

2. a. The history and purposes of BAPCPA's amendments to Section 1325 reinforce the court of appeals' interpretation of the term "projected disposable income." Although the legislative history that accompanied BAPCPA is not extensive, the House Judiciary Report explains that BAPCPA "[was] intended to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005). While in this case petitioner's mechanical approach would have required respondent to commit to make payments well in excess of the funds that would actually be available to her, in other cases that same approach would allow debtors to pay less than they could afford. See *In re Kagenveama*, 541 F.3d at 871 (affirming confirmation of plan pursuant to which debtor would pay less than her actual future disposable income). When a debtor's pre-filing disposable income understates the resources that are likely to be available to her during the plan period (*e.g.*, because of a tempo-

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[6] Section 1329 provides that "[a]t any time after confirmation of the plan * * *, the plan may be modified" for certain specified reasons upon request of the debtor, the trustee, or an unsecured creditor. 11 U.S.C. 1329(a). If the bankruptcy court may modify the plan *after* confirmation to take account of changes in a debtor's income or expenses, it would make little sense to preclude the court, in determining whether a plan should be confirmed, from taking account of changes in the debtor's financial circumstances that have occurred between the pre-filing period and the time of plan confirmation.

rary decrease in income or increase in expenses during the pre-filing period), mechanically projecting that income figure into the future would deprive creditors of payments that the debtor would be able to make during the plan period. That result is inconsistent with Congress's intent "that debtors pay the greatest amount within their capabilities. Nothing more; nothing less." *In re Kibbe*, 361 B.R. at 314.

b. Before BAPCPA's enactment, bankruptcy courts routinely considered anticipated changes to a debtor's financial circumstances when calculating "projected disposable income." See, *e.g.*, *In re Petro*, 395 B.R. 369, 377 (B.A.P. 6th Cir. 2008) ("Prior to BAPCPA the schedules were a starting point and courts gave meaning to 'projected' and 'to be received' by taking into account a debtor['s] anticipated future income."); *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W.Va. Jan. 23, 2008) ("Of course, under pre-BAPCPA law, bankruptcy courts sometimes deviated from the debtor's income and expenses listed on Schedules I & J based on known increases or decreases in either income or expenses."); Thomas J. Izzo, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 Emory Bankr. Dev. J. 521, 552 (2009) (Izzo).

Congress is presumed to be familiar with the backdrop against which it acts. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). For that reason, this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (quoting

Pennsylvania Dep't of Pub. Welfare v. *Davenport*, 495 U.S. 552, 563 (1990)). Although BAPCPA modified the formulae used to calculate a debtor's "disposable income," it did not address the manner in which the debtor's income is "projected" into the future. See pp. 4-5, *supra*. If Congress had intended to preclude bankruptcy courts from continuing to consider debtors' likely future financial circumstances when determining projected disposable income, "one would expect Congress to have made unmistakably clear its intent." *Cohen*, 523 U.S. at 222.

c. Petitioner asserts that "Chapter 13 [t]rustees quite vocally advised legislators" that BAPCPA's redefinition of disposable income "might not reflect a debtor's actual income." Pet. 26-27. But the change in the law to which petitioner refers has nothing to do with the manner in which disposable income is "projected." By establishing new formulae for calculating *current* disposable income (*i.e.*, disposable income during the six-month pre-filing period), BAPCPA limited bankruptcy courts' discretion to determine what types of revenue constitute income and what types of expenses are reasonable and necessary. Petitioner cites no evidence, however, suggesting that Congress intended to preclude (or that Chapter 13 trustees generally understood BAPCPA to preclude) bankruptcy courts from considering likely changes in a debtor's financial circumstances in calculating *projected* disposable income.

3. Under petitioner's approach, respondent would be required to commit to make payments of $756 per month, leaving her with $1166 per month for living expenses. Pet. App. 6, 44. That amount is $408 less than the applicable standard deductions for housing, utilities, food, clothing, and household and personal care sup-

plies—without even considering transportation, taxes, health care, and telecommunication expenses. *Id.* at 44.[7] Because that approach would require respondent to commit to payments that she cannot possibly afford, petitioner's plan is not confirmable. See 11 U.S.C. 1325(a)(6) (requiring as a condition of confirmation that "the debtor will be able to make all payments under the plan and to comply with the plan"). Petitioner acknowledges that, on his reading of Section 1325(b)(1)(B), respondent "may be effectively denied relief under Chapter 13, in that it is likely impossible for [her] to propose a feasible plan." Pet. 22.

Petitioner observes that, although "the results of the mechanical approach would be unfortunate for the current debtor, the results may be more 'debtor-friendly' in other cases." Pet. 23. But it is equally true that, under the court of appeals' approach, consideration of likely changes in financial circumstances will require debtors to make higher payments in some cases and allow them to make lower payments in others. That the mechanical approach does not systematically advantage or disadvantage debtors therefore provides no basis for preferring it to the court of appeals' analysis, which also does not systematically advantage or disadvantage debtors. Unlike petitioner's mechanical approach, however, the court of appeals' interpretation of the term "projected disposable income" furthers Congress' intent that every Chapter 13 debtor be required as a condition of plan

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[7] Under petitioner's mechanical approach, respondent could have been required to commit to make payments of as much as $1,115 per month, leaving her with as little as $807 per month for living expenses. Pet. App. 44. That amount would be $767 less than the applicable standard deductions for housing, utilities, food, clothing, and household and personal care supplies. *Ibid.*

confirmation to make payments at (*i.e.*, neither above nor below) the maximum level she can afford.

Petitioner observes that "the debtor always has control over the date of the filing of the petition." Pet. 22. But the potential for debtors to manipulate the bankruptcy system through strategic filing is a further disadvantage of petitioner's approach, not a reason to adopt it. On petitioner's reading of Section 1325(b)(1)(B), a debtor who had been unemployed for six months could file a Chapter 13 petition on the eve of obtaining a new job, commit to repaying little or nothing to unsecured creditors, and still obtain an eventual discharge of his pre-petition debts. See, *e.g.*, *In re Arsenault*, 370 B.R. 845, 847 (Bankr. M.D. Fla. 2007) (debtor filed his Chapter 13 petition in October and did not include his yearly bonuses in the calculation of his current monthly income). That result is squarely at odds with one of BAPCPA's core purposes: to deter abuse of the bankruptcy system by debtors with an actual ability to repay some or all of their debts.

At the same time, petitioner's interpretation of Section 1325(b)(1)(B) often will deny bankruptcy protection to those who need it most: debtors whose financial situation has significantly deteriorated during the six months prior to filing, during the period between filing and confirmation, or both. Pet. App. 71-72. As bankruptcy courts have recognized, "[b]ecause people are frequently forced to file for bankruptcy relief as a result of sudden life-altering events," there are "numerous debtors who would be foreclosed from seeking bankruptcy protection" if their current incomes were mechanically projected into the future, without any consideration of their actual financial circumstances. *In re Jass*, 340 B.R. at 417; see Izzo at 546; cf. *In re Grady*,

343 B.R. 747, 752 (Bankr. N.D. Ga. 2006) ("Certainly the proponents of BAPCPA did not intend to close the bankruptcy court doors to debtors who voluntarily, and in good faith, seek to repay creditors with the funds they actually have on hand each month."). Making the protections of the bankruptcy system unavailable to those whose financial situations may be most desperate is not what Congress intended in BAPCPA.

B. Review Is Warranted Because The Petition Presents An Important Question On Which The Circuits Are In Conflict

Whether, after BAPCPA, bankruptcy courts may consider anticipated changes to a debtor's future disposable income is an issue of critical importance to creditors, debtors, and trustees. BAPCPA is designed to channel many debtors from Chapter 7 into Chapter 13. See, *e.g.*, *In re Egebjerg*, 574 F.3d 1045, 1050 (9th Cir. 2009). The question presented here, which concerns the methodology used to determine how much a debtor must commit to repaying her unsecured creditors in order to secure confirmation of a contested plan, goes to the heart of bankruptcy courts' administration of Chapter 13. See Pet. 8 ("The most direct impact of this ruling is on the amount of money debtors will pay to creditors in Chapter 13.").

Although the court of appeals resolved that question correctly in this case, its decision deepens a pre-existing conflict among the circuits that warrants this Court's resolution. Consistent with the decision below, the Fifth and Eighth Circuits have held that in calculating the projected disposable income of a Chapter 13 debtor, bankruptcy courts may consider likely or reasonably certain changes to the debtor's financial circumstances

during the plan period. See *In re Nowlin*, 576 F.3d at 263; *In re Fredrickson*, 545 F.3d at 659. And the Seventh Circuit has held that bankruptcy courts may consider definite changes to the debtor's financial circumstances during the plan period. See *In re Turner*, 574 F.3d 349, 355-356 (2009). In contrast, the Ninth Circuit has held that bankruptcy courts may not consider any anticipated changes, no matter their likelihood, in calculating a Chapter 13 debtor's projected disposable income. See *In re Kagenveama*, 541 F.3d at 874-875. That conflict among the circuits is reflected in a score of decisions from bankruptcy courts and appellate panels. See Pet. 12-14; Pet. App. 66-69 & nn.18, 20. This case provides an appropriate opportunity for the Court to resolve that persistent split in authority.

Although respondent declined to participate before the court of appeals or to file a response to the petition for a writ of certiorari, she may choose to file a brief on the merits if the petition is granted. If respondent declines to participate, the Court could appoint counsel to serve as an amicus curiae in support of the judgment. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 532 U.S. 917, 917 (2001). Moreover, the government filed a brief as an amicus curiae in the court of appeals, and it anticipates doing so in this Court if the petition is granted. Because procedural mechanisms are available to ensure adversarial presentation of the issues, and because the question presented warrants resolution by this Court, respondent's lack of participation to date should not insulate the case from further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2009

JOINT APPENDIX

No. 08-998

SUPREME COURT, U.S.
FILED
DEC 21 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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OPINIONS, JUDGMENTS AND ORDERS CONTAINED IN THE PETITION APPENDIX

The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Memorandum and Opinion Sustaining Trustee's Objection to Confirmation of the United States Bankruptcy Court for the District of Kansas entered May 15, 2007 .....Pet. App. 54

Opinion from the United States Bankruptcy Appellate Panel from the Tenth Circuit as corrected January 9, 2008 .....Pet. App. 33

Opinion from the United States Court of Appeals for the Tenth Circuit, entered November 13, 2008 .....Pet. App. 1

RELEVANT DOCKET ENTRIES

U.S. Bankruptcy Court
District of Kansas (Topeka)
Bankruptcy Petition # 06-41037
Stephanie Kay Lanning, Debtor

10/16/2006	1	Chapter 13 Voluntary Petition. Fee Amount $54 Filed by Stephanie Kay Lanning Debtor Declaration Re: Electronic Filing Due by 10/23/2006. (Brunton, Michael) (Entered: 10/16/2006)
10/16/2006		First Meeting of Creditors & Notice of Appointment of Trustee Jan Hamilton to be held on 11/09/2006 at 10:00 AM at Topeka Post Office Room 303. Proof of Claim due by 02/07/2007. Confirmation Hearing to be Held on 12/20/2006 at 09:00 AM at Topeka Room 210. *Autogenerated* (Entered: 10/16/2006)
10/16/2006	2	Chapter 13 Plan Filed by Debtor Stephanie Kay Lanning. (Brunton, Michael) (Entered: 10/16/2006)
10/16/2006	3	Application to Pay Filing Fee in Installments. Filed on behalf of Debtor Stephanie Kay Lanning. (Brunton, Michael) (Entered: 10/16/2006)
10/16/2006	4	Employee Income Records Filed by Debtor Stephanie Kay Lanning. (Attachments: # 1 Paystubs) (Brunton, Michael) (Entered: 10/16/2006)

10/16/2006	5	Certificate of Credit Counseling Filed by Debtor Stephanie Kay Lanning. (Brunton, Michael) (Entered: 10/16/2006)
10/17/2006	6	Order to Correct Voluntary Petition in Bankruptcy. Missing or Defective Documents Due: Signed on 10/17/2006 Voluntary Petition due 11/1/2006. Incomplete Filings due by 11/1/2006. (tdm,) (Entered: 10/17/2006)
10/17/2006	7	Meeting of Creditors and Notice of Requirement to Complete Course in Financial Management. (RE: related document(s) 2 Chapter 13 Plan filed by Debtor Stephanie Kay Lanning) Objection to Section 523 Due: 1/8/2007. Government Proof of Claim due by 4/16/2007. (tdm,) (Entered: 10/17/2006)
10/17/2006	8	Order To Debtor to Pay the Trustee directing Debtor to make Monthly payments of $144.00. Signed on 10/17/2006 (tdm,) (Entered: 10/17/2006)

* * *

10/24/2006	14	Order Granting Application To Pay Filing Fees In Installments. (Related Doc # 3). Signed on 10/24/2006. Final Installment Payment due by 2/21/2007. (tdm,) (Entered: 10/24/2006)

* * *

11/01/2006 16 Amended Schedules. *Amended Petition using Official Form* Filed by Debtor Stephanie Kay Lanning. (Brunton, Michael) (Entered: 11/01/2006)

11/01/2006 17 Amended Schedules. *Exhibit D with Credit Counseling Certificate* Filed by Debtor Stephanie Kay Lanning. (Brunton, Michael) (Entered: 11/01/2006)

* * *

11/09/2006 19 Meeting of Creditors Held and Concluded. (Hamilton, Jan) (Entered: 11/09/2006)

* * *

01/04/2007 21 Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) does not Determine Plan Payment Filed on behalf of Debtor Stephanie Kay Lanning.(Brunton, Michael) (Entered: 01/04/2007)

* * *

01/17/2007 23 Response to *(related document(s): 21 Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) does not Determine Plan Payment filed by Debtor Stephanie Kay Lanning)* Filed by Trustee Jan Hamilton (Hamilton, Jan) (Entered: 01/17/2007)

01/24/2007	24	Courtroom Minute Sheet (JMK), Ruling:Text order continuing hearing filed; Court sets 2/28/07 as deadline for filing simultaneous briefs regarding the Motion for Determination. Trustee advises he will stipulate to the facts contained in the motion. (RE: related document(s) 2 Chapter 13 Plan filed by Debtor Stephanie Kay Lanning, 21 Generic Motion filed by Debtor Stephanie Kay Lanning) (tjr,) (Entered: 01/25/2007)

* * *

02/22/2007	26	Motion to File Objection to Confirmation Out-of-Time Filed on behalf of Trustee Jan Hamilton.(Hamilton, Jan) (Entered: 02/22/2007)
02/22/2007	27	Notice of Objection Deadline. Proposed Hearing to be held 03/28/07 at 1:30 pm. Certificate of Service on 02/22/07. Filed by Jan Hamilton on behalf of Jan Hamilton *(RE: related document(s) 26 Motion to File Objection to Confirmation Out of Time Filed on behalf of Trustee Jan Hamilton. (Hamilton, Jan))* Objections due by 3/14/2007. (Hamilton, Jan) (Entered: 02/22/2007)

* * *

02/28/2007	29	Motion to Extend Time to Time to File Brief Filed on behalf of Debtor Stephanie Kay Lanning.(Brunton, Michael) (Entered: 02/28/2007)
03/01/2007	30	Order Granting Motion to Extend/ Shorten Time until 3/14/07 to file briefs (Related Doc # 29) Signed on 3/1/2007. (tjr,) (Entered: 03/02/2007)

* * *

03/14/2007	32	Support Brief, with Certificate of Service (RE: related document(s) 21 Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) does not Determine Plan Payment). Filed by Trustee Jan Hamilton. (Hamilton, Jan) . **Modified on 4/2/2007 to include related document** (tjr,). (Entered: 03/14/2007)
03/14/2007	33	Brief, with Certificate of Service. Filed by Debtor Stephanie Kay Lanning (RE: related document(s) 21 Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) does not Determine Plan Payment). (Brunton, Michael) (Entered: 03/14/2007)

03/15/2007	34	Objection to Confirmation of Plan, with Certificate of Service. Filed by Trustee Jan Hamilton. (Hamilton, Jan) **Modified on 3/16/2007 to include relation to 2 Chapter 13 Plan.(tjr,). (Entered: 03/15/2007)
03/15/2007	35	Notice of Hearing Filed by Jan Hamilton on behalf of Jan Hamilton *(RE: related document(s) 34 Objection to Confirmation of Plan, with Certificate of Service. Filed by Trustee Jan Hamilton. (Hamilton, Jan))* Hearing to be held on 3/28/2007 at 01:30 PM Topeka Room 210 for 34, (Hamilton, Jan) (Entered: 03/15/2007)
03/16/2007	36	Order Granting Motion to File Out of Time (Related Doc # 26) Signed on 3/16/2007. (tjr,) (Entered: 03/16/2007)

* * *

04/25/2007	40	Courtroom Minute Sheet (JMK), Ruling:Court read ruling into record on Motion for Determination; Decision to be issued; Debtors have 20 days to respond; Continued to 5/30/07, 1:30 p.m. (RE: related document(s) 2 Chapter 13 Plan filed by Debtor Stephanie Kay Lanning, 21 Generic Motion filed by Debtor Stephanie Kay Lanning) (tjr,) (Entered: 04/26/2007)

05/07/2007	41	Motion to Extend Time to Appeal Under Rule 8002(c) Filed on behalf of Debtor Stephanie Kay Lanning. (Brunton, Michael) (Entered: 05/07/2007)
05/15/2007	42	Decision and Order. Signed on 5/15/2007 (tjr,) Additional attachment(s) added on 5/31/2007 (tjr,). **Modified on 5/31/2007 to attach correct PDF per Amendment Order 56 ** (tjr,). (Entered: 05/15/2007)
05/15/2007	43	Order Designated as Opinion Signed on 5/15/2007 (tjr,) Additional attachment(s) added on 5/31/2007 (tjr,). **Modified on 5/31/2007 to attach correct PDF per Amendment Order 56 ** (tjr,). (Entered: 05/15/2007)
05/15/2007	44	Judgment on Decision Signed on 5/15/2007 (tjr,) (Entered: 05/15/2007)
05/15/2007	45	Order Granting Motion (Related Doc # 21) Signed on 5/15/2007. (tjr,) (Entered: 05/16/2007)

* * *

05/23/2007	48	Notice of Appeal to 10th Circuit Court of Appeals with Certificate of Service . Fee Amount $255 Filed by Trustee Jan Hamilton (RE: related document(s) 45 Order on Generic Motion, 44 Judgment, 42 Decision and Order). Appellant Designation due by 6/4/2007. (Hamilton, Jan) (Entered: 05/23/2007)

05/23/2007	49	Petition Requesting Direct Appeal to Circuit Court Filed by Trustee Jan Hamilton. (Attachments: # 1 Exhibit Memorandum and Order# 2 Exhibit Judgment on Decision)(Hamilton, Jan) (Entered: 05/23/2007)
05/23/2007		Notice from BAP: BAP Appeal Number:KS-07-067 (related document(s): 48 Notice of Appeal,). (BAP-NB,) (Entered: 05/23/2007)
05/24/2007	50	Order Mooting Motion to Extend Time to Appeal Under Rule 8002(c) (Related Doc # 41) Signed on 5/24/2007. (tjr,) (Entered: 05/24/2007)

* * *

05/29/2007	52	Notice from BAP: Appeal filing fee has not been paid in full. Appeal will be dismissed if fee is not paid (related document(s): 48 Notice of Appeal,). (BAP-KH,) (Entered: 05/29/2007)
05/29/2007	53	Notice from BAP: Appeal has been docketed. Notice includes deadlines for filing papers with the BAP (related document(s): 48 Notice of Appeal,). (Attachments: # 1 Case Caption) (BAP-KH,) (Entered: 05/29/2007)

* * *

05/30/2007	55	Courtroom Minute Sheet (JMK), Ruling:Trustee to disburse as if Confirmed; Matter on Appeal; Text Order continued to 12/19/07, 1:30 p.m. (RE: related document(s) 2 Chapter 13 Plan filed by Debtor Stephanie Kay Lanning) (tjr,) (Entered: 05/31/2007)
05/31/2007	56	Amendment to Memorandum and Opinion Sustaining Trustee's Objection to Confirmation Dated 5/15/07 Signed on 5/31/2007 (tjr,) (Entered: 05/31/2007)
06/01/2007	57	Appellant Designation of Contents For Inclusion in Record On Appeal with Certificate of Service Filed by Trustee Jan Hamilton (RE: related document(s) 48 Notice of Appeal,). (Hamilton, Jan) (Entered: 06/01/2007)
06/01/2007	58	Statement of Issues on Appeal, with Certificate of Service Filed by Trustee Jan Hamilton (RE: related document(s) 48 Notice of Appeal,). (Hamilton, Jan) (Entered: 06/01/2007)
		Receipt of filing fee for Notice of Appeal(06-41037) [appeal,ntcapl] (255.00). Receipt number 467195, amount $255.00. (tjr) (Entered: 06/04/2007)

* * *

06/06/2007 60 Order Authorizing Distribution of Funds as if Plan were Confirmed Signed on 6/6/2007 (tjr,) (Entered: 06/07/2007)

* * *

07/31/2007 73 Notice from BAP: BAP Order entered (related document(s): 48 Notice of Appeal,). (BAP-KH,) (Entered: 07/31/2007)

07/31/2007 74 Notice from BAP: BAP Order entered (related document(s): 48 Notice of Appeal,). (BAP-KH,) (Entered: 07/31/2007)

07/31/2007 75 Notice from BAP: BAP Order entered (related document(s): 48 Notice of Appeal,). (Attachments: # 1 Notice of Appeal with Cert. Request) (BAP-KH,) (Entered: 07/31/2007)

* * *

09/07/2007 78 ORDER DENYING PERMISSION TO APPEAL Re: *Petition Requesting Direct Appeal to Circuit Court Filed by Trustee Jan Hamilton. (Attachments: #(1) Exhibit Memorandum and Order #(2) Exhibit Judgment on Decision (Hamilton, Jan) filed by Trustee Jan Hamilton* Signed on 9/7/207 (tjr,) (Entered 09/10/2007)

* * *

12/13/2007 81 Notice from BAP: Courtesy copy of published opinion. The bankruptcy court's order/judgment is affirmed (related document(s): 48 Notice of Appeal,). (BAP-KH,) (Entered: 12/13/2007)

* * *

12/27/2007 83 Notice from BAP: BAP Mandate has been issued (related document(s): 48 Notice of Appeal,). (Attachments: # 1 Opinion) (BAP-BS,) (Entered: 12/27/2007)

01/08/2008 84 Notice from BAP: Memo advising of correction to previous BAP decision (related document(s): 48 Notice of Appeal,). (BAP-KH,) (Entered: 01/08/2008)

01/09/2008 85 Notice from BAP: Memo advising of correction to previous BAP decision (related document(s): 48 Notice of Appeal,). (BAP-KH,) (Entered: 01/09/2008)

* * *

01/10/2008 93 Notice from BAP: Notice of Appeal to the Tenth Circuit Court of Appeals (related document(s): 48 Notice of Appeal,). (Attachments: # 1 BAP Transmittal Letter) (BAP-KH,) (Entered: 07/08/2008)

* * *

12/08/2008 102 Notice from BAP: Decision of the Tenth Circuit Court of Appeals (related document(s): 48 Notice of Appeal,). (Attachments: # 1 Circuit Opinion# 2 Circuit Judgment) (BAP-KH,) (Entered: 12/08/2008)

RELEVANT DOCKET ENTRIES

United States Bankruptcy Appellate
Panel of the Tenth Circuit
KS-07-067
Stephanie Kay Lanning, Debtor
Jan Hamilton, Trustee, Appellant

05/23/2007 [56799] APPEAL: Bankruptcy appeal filed. Appeal filed in the Bankruptcy Court on 05/23/2007. Notification of appeal transmitted from the Bankruptcy Court by fax/email. Record transmission received/downloaded from the bankruptcy court. Entry Date: 05/29/2007.

05/23/2007 [57644] CERTIFICATION: Certification of Case to the Court of Appeals filed by Appellant Jan Hamilton. Request for Certification was found within the body of the Notice of Appeal.

05/29/2007 [56800] LETTER: Notice that appeal has been docketed with appeal caption. Statement of Interested Parties, copy of designation of record, and copy of statement of issues due 06/08/2007 for Jan Hamilton. Appellant's brief due 07/13/2007 for Jan Hamilton. Mailed to all parties and mailed/transmitted to the bankruptcy court on 05/29/2007. Entry Date: 05/29/2007.

05/29/2007 [56801] ORDER: Notice of Deficiency sent to Appellant Jan Hamilton, re: failure to pay filing and docketing fees. Mailed to all parties. Response due 06/08/2007 for Jan Hamilton. Service Date: 05/29/2007.

06/01/2007 [56870] DOCUMENT: Statement of interested parties filed by Appellant Jan Hamilton.

06/01/2007 [56916] DOCUMENT: Service copy of Statement of Issues filed by Appellant Jan Hamilton.

06/01/2007 [56917] DOCUMENT: Service copy of Designation of Record filed by Appellant Jan Hamilton.

06/06/2007 [56948] DOCUMENT: Notice to Participate as Amicus in Support of Appellee filed by Joyce Owen, Assistant United States Trustee, on behalf of Felicia S. Turner, United States Trustee.

06/07/2007 [57135] PARTY: Party Added: Amicus Curiae United States Trustee.

06/14/2007 [57040] RESPONSE: Response to Notice of Deficiency: fee paid by Appellant Jan Hamilton. The deficiency is satisfied.

06/20/2007 [57134] MOTION: Appellant Jan Hamilton's Motion to extend time to file appellant's opening brief until 08/24/2007. Served on 06/20/2007.

06/21/2007 [57136] ORDER: Clerk's order filed granting Motion to extend time to file appellant's opening brief. [57134-2] Appellant's brief due 08/24/2007 for Jan Hamilton. Service Date: 06/21/2007. Mailed to all parties. Entry Date: 06/21/2007.

06/27/2007 [57225] ORDER: Order to Show Cause Why Appeal Should not be Considered for Dismissal as Interlocutory and Vacating Briefing Deadline sent to Appellant Jan Hamilton. All parties served by mail on 06/27/2007. Response due 07/12/2007 by Jan Hamilton.

07/05/2007 [57353] RESPONSE: Memorandum in response to Order to Show Cause filed by Appellant Jan Hamilton. Served on: 07/05/2007.

07/05/2007 [57356] MOTION: Appellant Jan Hamilton's Motion to extend time to file appellant's opening brief if interlocutory appeal is granted. Served on 07/05/2007.

07/06/2007 [57355] MOTION: Appellant Jan Hamilton's Motion for leave to appeal filed. Served on 07/06/2007.

07/09/2007 [57392] DOCUMENT: Cover sheet states: attached exhibits inadvertently left off of Motion for leave to appeal interlocutory order filed on July 5, 2007 [57355-2] filed by Appellant Jan Hamilton.

07/31/2007 [57615] ORDER: Order filed by Judges BOHANON; CORNISH; BROWN granting Motion for leave to appeal [57355-2]; granting Motion to extend time to file appellant's opening brief [57356-2]. Appellant's opening brief is due September 14, 2007. Mailed to all parties and Bankruptcy Court. Service Date: 07/31/2007. Entry Date: 07/31/2007.

07/31/2007 [57616] ORDER: Order filed by Judges BOHANON; CORNISH; BROWN granting Request for Certification. Petition for Certification must be filed with the Tenth Circuit by 8/10/07. Mailed to all parties. Service Date: 07/31/2007. Entry Date: 07/31/2007.

07/31/2007 [57617] Notice of filing of Certification to Court of Appeals sent to the parties, bankruptcy court and UST.

08/03/2007 [57680] DOCUMENT: Courtesy Copy of Petition of Appellant for Permission to Appeal Directly to the Court of Appeals filed by Appellant Jan Hamilton.

09/05/2007 [57907] NOTICE: The 10th Circuit is in receipt of the Petition for Direct Appeal and has assigned Circuit case number: 07-602.

09/13/2007 [58003] BRIEF: Filed the original and 3 copies of Appellant Jan Hamilton's Opening Brief; deemed filed on the service date of 09/12/2007. Oral argument requested: no. No image attached.

09/13/2007 [58004] APPENDIX: 1 volume of Appendix filed by Appellant Jan Hamilton; deemed filed on the service date of 09/12/2007. No image attached.

09/13/2007 [58005] SERVICE: Certificate of Service filed by Appellant Jan Hamilton for Appellant Brief [58003-2] and Appendix [58004-2].

09/13/2007 [58006] BRIEF: No appellee in case; no brief filed.

09/13/2007 [58007] DOCUMENT: Circuit Order denying direct appeal obtained from Circuit's docket. Order was filed by the Circuit on 9/05/07.

10/01/2007 [58145] BRIEF: Filed the original and 3 copies of United States Trustee's brief; deemed filed on the service date of 09/28/2007.

10/01/2007 [58146] APPENDIX: 1 volume of appendix filed by Amicus Curiae United States Trustee; deemed filed on the service date of 09/28/2007. No image attached.

11/08/2007 [58494] DOCUMENT: Notice of Filing of Supplemental Authority filed by United States Trustee. Served on 11/08/2007.

11/09/2007 [58503] DOCUMENT: Additional Authorities filed by Jan Hamilton. Served on 11/09/2007.

12/13/2007 [58728] MERITS: FILED OPINION (Judges BOHANON; MCNIFF; THURMAN); the decision of the bankruptcy court is AFFIRMED. Appeal is submitted on the briefs. FILED AND ENTERED JUDGMENT. Mailed to all parties. Mailed/transmitted to bankruptcy court. Entry Date: 12/13/2007.

12/13/2007 [58729] JUDGMENT: Disposition and notice of entry of judgment sent to parties, regional U.S. Trustee, Bankruptcy judge, and mailed/transmitted to the bankruptcy court. Service Date: 12/13/2007.

12/13/2007 [58730] CLOSED: Case closed: Affirmed; Terminated on the merits after submissions without oral hearing; Written, reasoned, signed, published; By Judges BOHANON; MCNIFF; THURMAN (author).

12/27/2007 [58779] MANDATE: BAP mandate filed and served. Notice of mandate mailed to parties, the regional U.S. Trustee and mailed/transmitted to the bankruptcy court on 12/27/2007.

01/02/2008 [58833] APPEAL: Case appealed to Tenth Circuit by Jan Hamilton. Fee $455. Receipt no.: 1849. Circuit case number due: 01/11/2008.

01/08/2008 [58879] MEMORANDUM: Correction memorandum filed amending Opinion [58728-2]. Service Date: 01/08/2008.

01/09/2008 [58886] MEMORANDUM: Second correction memorandum filed amending Opinion [58728-2]. Service Date: 01/09/2008.

01/10/2008 [58891] NOTICE: Notice of filing of appeal to Circuit Court mailed to all parties, the U.S. Trustee, and mailed/ transmitted to the Kansas-Topeka Bankruptcy Court. The transmittal letter, together with the documents listed therein, were hand delivered to the Tenth Circuit Court of Appeals.

01/14/2008 [58919] Filed 10th Circuit Court of Appeals Case Number: 08-3009. No image attached.

01/25/2008 [59048] DOCUMENT: Transcript Order Form filed by Appellant Jan Hamilton.

11/13/2008 [61453] CIRCUIT: Circuit decision filed on 11/13/2008. Disposition: Affirmed. Circuit mandate to issue.

12/08/2008 [61639] CIRCUIT: Circuit mandate filed on 12/08/2008. Disposition: Affirmed. All parties, U.S. Trustee, bankruptcy court, and bankruptcy court judge served 12/08/2008.

02/09/2009 [62155] CIRCUIT: NDA filed on 02/09/2009 re: Petition for Writ of Certiorari filed, Supreme Court number: 08-998.

11/05/2009 [64239] CIRCUIT: NDA filed on 11/06/2009 re: Supreme Court Grants Certiorari limited to the following question: "Whether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period."

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Tenth Circuit
08-3009
Jan Hamilton, Trustee, Appellant
v.
Stephanie Kay Lanning, Debtor

01/14/2008 [9540964] Civil case docketed. Preliminary record filed. DATE RECEIVED: 01/11/2008 Docketing statement due 01/29/2008 for Jan Hamilton. Notice of appearance due on 01/29/2008 for Jan Hamilton and Stephanie Kay Lanning.

01/14/2008 [9540968] Filed notice record is complete. Served on 01/14/2008. Manner of Service: US Mail. Appellant's brief and appendix due on 02/25/2008 for Jan Hamilton.

01/22/2008 [9542768] Notice received from Mr. Jan Hamilton that a transcript is not necessary for this appeal.

01/22/2008 [9542786] Docketing statement filed by Mr. Jan Hamilton. Original and 0 copies. Served on 01/22/2008. Manner of Service: US Mail.

01/23/2008 [9542907] Notice of appearance filed by Ms. Teresa L. Rhodd for Mr. Jan Hamilton. CERT. OF INTERESTED PARTIES: y. Served on 01/22/2008. Manner of Service: US Mail.

01/23/2008 [9543201] Case referred for mediation conferencing. Please open the document link in this notice for additional information.

01/28/2008 [9544021] Case mediation conferencing terminated.

01/29/2008 [9544325] Notice of appearance filed by Ms. Melissa R. Burgess, Mr. Sean E. Martin and Mr. P. Matthew Sutko for United States Trustee. CERT. OF INTERESTED PARTIES: y. Served on 01/29/2008. Manner of Service: US Mail.

02/08/2008 [9547224] Deficiency notice issued. Type of deficiency: Notice of appearance not filed. Notice of appearance due on 02/19/2008 for counsel for Stephanie Kay Lanning.

02/20/2008 [9549543] Notice of appearance filed by Mr. Michael F. Brunton for Ms. Stephanie Kay Lanning. CERT. OF INTERESTED PARTIES: y. Served on 02/15/2008. Manner of Service: US mail.

02/26/2008 [9550807] Appellant brief filed by Mr. Jan Hamilton. Original and 7 copies.. Served on 02/25/2008 by email. Oral argument requested? n. Appendix filed. Original and 1 copy(s). Appendix pages: 191. Appellee's brief due 03/31/2008 for Stephanie Kay Lanning.

04/04/2008 [9560339] Amicus Curiae brief filed by United States of America in 08-3009 United States of America. Original and 7 copies.. Served on 03/31/2008. Manner of Service: US mail.

04/15/2008 [9562377] Letter from attorney Michael Brunton indicating that he does not intend to participate in the case. Original and 1 copies. Served on 04/07/2008. Manner of Service: US mail.

10/31/2008 [9608971] Supplemental Authority received from Amicus United States of America but not filed. Original and 7 copies. Served on 10/30/2008. Manner of Service: US mail.

11/06/2008 [9610406] Supplemental authority filed by amicus United States of America. Served on 10/30/2008. Manner of Service: US mail.

11/13/2008 [9611658] Affirmed. Terminated on the merits after submissions without oral hearing. Written, signed, published. Judges Murphy, Brorby (Authoring Judge), and Tymkovich. Mandate to issue.

11/13/2008 [9611662] Judgment for opinion filed.

12/08/2008 [9617539] Mandate issued.

02/09/2009 [9633043] Petition for writ of certiorari filed by Jan Hamilton, Chapter 13 Trustee on 02/03/2009. Supreme Court number 08-998.

11/05/2009 [9708671] Supreme court order dated 11/02/2009 filed granting certiorari limited to the following question: "Whether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period."

United States Bankruptcy Court **District of Kansas**	VOLUNTARY PETITION
Name of debtor – If individual, enter, Last, First, Middle) **Lanning, Stephanie Kay**	**NAME OF JOINT DEBTOR (Spouse) – (Last, First, Middle)**
(Include married, maiden, and trade names) ALL OTHER NAMES used by debtor in the last 6 years	ALL OTHER NAMES used by joint debtor in the last 6 years (Include married, maiden, and trade names)
SOC. SEC./TAX I.D. (If more than one, state all)	SOC. SEC./TAX I.D. (If more than one, state all)
***-**-2076	***-**-
STREET ADDRESS OF DEBTOR (No. and street, city, state and zip code)	STREET ADDRESS OF JOINT DEBTOR (No. and street, city, state and zip code)
[Home Address Omitted]	
COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS **Shawnee**	COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS
MAILING ADDRESS OF DEBTOR (If different from street address)	MAILING ADDRESS OF JOINT DEBTOR (If different from street address)
LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (if different from above)	

INFORMATION REGARDING DEBTOR (check applicable boxes)

VENUE

☑ Debtor had been domiciled or has had a residence, principal place of buisness or principle assets in this district for 180 days immediately preceeding the date of of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this Districtt

TYPE OF DEBTOR

- ☑ Individual
- ☐ Joint
- ☐ Partnership
- ☐ Corporation Publicly Held
- ☐ Corporation Not Publicly Held
- ☐ Municipality
- ☐ Other

NATURE OF DEBT

- ☑ Nonbusiness/Consumer
- ☐ Business – Complete A ⊻ B

CHAPTER OR SECTION OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☑ Chapter 13
- ☐ Sec. 304

FILING FEE (Check one box)

- ☐ Filing fee attached
- ☑ Filing fee to be paid in installments. (Applicable to individuals only) must attach signed application certifying that the Debtor is unable to pay fee except in installments. Rule 1006(b)

STATISTICAL ADMINISTRATIVE INFORMATION
(U.S.C. 28 Sec. 604) (Estimates only) (Check applicable boxes)

- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☑ Debtor estimates that, after any exempt property is excluded and administrative expen there will be no funds available for distribution to unsecured creditors.

THIS SPACE FOR COURT USE ONLY

ESTIMATED NUMBER OF CREDITORS

1-15	16-49	50-99	100-199	200-999	1000-over
☑	☐	☐	☐	☐	☐

ESTIMATED ASSETS (In thousands of dollars)

Under 50	50-99	100-499	500-999	10,000-99,999	100,000-over
☐	☑	☐	☐	☐	☐

ESTIMATED LIABILITIES (In thousands of dollars)

Under 50	50-99	100-499	500-999	10,000-99,999	100,000-over
☐	☑	☐	☐	☐	☐

VOLUNTARY PETITION
this page must be completed and filed in every case

Name of Debtor:
Stephanie Lanning

PRIOR BANKRUPTCY CASE FILED WITHIN LAST 6 YEARS		
Location Where Filed	**Case Number**	**Date Filed**

PENDING BANKRUPTCY CASE FILED BY ANY SPOUSE, PARTNER or AFFILIATE OF THE DEBTOR (If more than one, attach sheet)					
Name of Debtor **None**	**Case Number**	**Date**	**Relationship**	**District**	**Judge**

EXHIBIT "A"

(To be completed if debtor is required to file periodic reports e.g. forms 10 K and 10 Q with the Secutities and Exchange Commission Act of 1934 and is requesting relief under Chapter 7)

☐ Exhibit "A" is attached and made a part of this petition.

EXHIBIT "B"

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, Michael F. Brunton, attorney for the petitioner named in the foregoing petition declare that I have informed the petitioner that he, she or they may proceed under chapter 7, 13, or if applicable, chapter 11 or 12 of Title 11 U.S.C. and have explained the relief available under each Chapter

EXHIBIT "C"

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit is attached And made a part of this petition

☑ No

s/ Michael F. Brunton

Michael F. Brunton # 10901
Attorney for Debtor(s)

10/16/2006

date

Certification Concerning Debt Counseling by Individual/Joint Debtor(s)

☑ I/we have received approved budget and credit counseling during the 180-day period preceding the filing of this petition.

☐ I/we request a waiver of the requirement to obtain budget and credit counseling prior to filing based on exigent circumstances. (Must attach certification describing.)

Statement by a Debtor Who Resides as a Tenant of Residential Property

☐ Landlord has a judgment against the debtor for possession of debtor's residence.

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

Name of Landlord

Address of Landlord

SIGNATURES

SIGNATURES OF INDIVIDUAL/JOINT DEBTOR(S)

x I declare under penalty of perjury that the information provided in this petition is true and correct. If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under Chapter 7, I am aware that I may proceed under chapter 7, 11, 12 or 13 of Title 11 USC and choose to proceed as set forth above. I request relief in accordance with the chapter of tittle 11 USC set forth in this petition

x **s/ Stephanie Kay Lanning**
Lanning, Stephanie Kay

10/16/2006
Date

Date

SIGNATURE OF ATTORNEY

s/ Michael F. Brunton
Topeka, Kansas 66603
Law Offices of Michael F. Brunton
Jayhawk Tower
700 SW Jackson, Roof Garden Suite
785-233-5117

SIGNATURE OF CORPORATE OR PARTNERSHIP DEBTOR

I declare under penalty of perjury that the information provided in this petition is true and correct and that the filing of this petition on behalf of the debtor has been authorized

10/16/2006
date

Signature of Authorized Individual

Print or Type Name of Authorized Individual

Title of Individual Authorized by Debtor to File this Petition

Date

UNITED STATES BANKRUPTCY COURT

DISTRICT OF KANSAS

STATEMENT OF FINANCIAL AFFAIRS

Form B7 Case No.

In re: **Stephanie Lanning** Chapter **13**

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. Do not include the name or address of a minor child in this statement. Indicate payments, transfers and the like to minor children by stating "a minor child." See 11 U.S.C. § 112; Fed. R. Bankr. P. 1007(m).

Questions 1-18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19-25. If the answer to an applicable question is "None," mark the box labeled "None." If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be "in business" for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor's primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

None 1. Income from employment or operation of business

☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business,

including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

Year	Amount	Source
2006	$7,453.79	Jo-Anns
2005	54,516.00	Payless
2004	$43,147.00	Payless

None 2. Income other than from employment or operation of business

☐ State the amount of income received by the debtor other than from employment, trade, profession, operation of the debtor's business during the two years immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is

filed, unless the spouses are separated and a joint petition is not filed.)

Year	Amount	Source
2006	$2,100.00 (est)	unemployment

None 3. Payments to creditors

☐ Complete a. or b., as appropriate, and c.

a. Individual or joint debtor(s) with primarily consumer debts: List all payments on loans, installment purchases of goods or services, and other debts to any creditor made within 90 days immediately preceding the commencement of this case if the aggregate value of all property that constitutes or is affected by such transfer is not less than $600. Indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and creditor counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

Name and Address of Creditor	Date of Payments	Amount Paid	Amount still owing
Kansas CU (Car payments)	06-09/06	$1,170.00	0
US Bank (House Payments)	06-08/06	$1,365.00	56,000
MBNA	07-08/06	$1,492.00	16,108

None

☑ b. Debtor whose debts are not primarily consumer debts: List each payment or other transfer to any creditor made within 90 days immediately preceding the commencement of the case if the aggregate value of all property that constitutes or is affected by such transfer is not less than $5,000. (Married debtors filing under chapter 12 or chapter 13 must include payments and other transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None

☑ c. All debtors: List all payments made within one year immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 4. Suits and administrative proceedings, executions, garnishments and attachments

☑ a. List all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or

not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None

☑ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 5. Repossessions, foreclosures and returns

☑ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 6. Assignments and receiverships

☑ a. Describe any assignment of property for the benefit of creditors made within 120 days immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint

petition is filed, unless the spouses are separated and a joint petition is not filed.)

None

☑ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 7. Gifts

☑ List all gifts or charitable contributions made within one year immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 8. Losses

☑ List all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case. (Married debtors

filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 9. Payments related to debt counseling or bankruptcy

☑ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within one year immediately preceding the commencement of this case.

None 10. Other transfers

☑ List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within two years immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None

☑ b. List all property transferred by the debtor within ten years immediately preceding the commencement of this case to a self-settled trust or similar device of which the debtor is a beneficiary.

None 11. Closed financial accounts

☑ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within one year immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 12. Safe deposit boxes

☑ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within one year immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 13. Setoffs

☑ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor

within 90 days preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

None 14. Property held for another person

☑ List all property owned by another person that the debtor holds or controls.

None 15. Prior address of debtor

☑ If debtor has moved within three years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

None 16. Spouses and Former Spouses

☑ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within eight years immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

None 17. Environmental Information.

☑ For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

None

☑ b. List the name and address of every site for which the debtor provided notice to a

governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

None

☑ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

None 18. Nature, location and name of business

☑ a. If the debtor is an individual, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full- or part-time within six years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within six years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting

or equity securities, within six years immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within six years immediately preceding the commencement of this case.

None

☑ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

None 19. Books, records and financial statements

☑ a. List all bookkeepers and accountants who within two years immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

None

☑ b. List all firms or individuals who within two years immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

None

☑ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

None

☑ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued by the debtor within two years immediately preceding the commencement of this case.

None 20. Inventories

☑ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

None

☑ b. List the name and address of the person having possession of the records of each of the inventories reported in a., above.

None 21. Current Partners, Officers, Directors and Shareholders

☑ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

None

☑ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

None 22. Former partners, officers, directors and shareholders

☑ a. If the debtor is a partnership, list each member who withdrew from the partnership within one year immediately preceding the commencement of this case.

None

☑ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within one year immediately preceding the commencement of this case.

None 23. Withdrawals from a partnership or distributions by a corporation

☑ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during one year immediately preceding the commencement of this case.

None 24. Tax Consolidation Group.

☑ If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within six years immediately preceding the commencement of the case.

None 25. Pension Funds.

☑ If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within six years immediately preceding the commencement of the case.

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

X	**/s/ Stephanie Kay Lanning** Signature of Debtor: Stephanie Kay Lanning	**10/16/2006** Date
X	**/s/** Signature of Joint Debtor:	**10/16/2006** Date

[If completed on behalf of a partnership or corporation]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and

that they are true and correct to the best of my knowledge, information and belief.

X _____ _____
Signature Date

_____
Print Name and Title

NO continuation sheets attached
Penalty for making a false statement:
Fine of up to $500,000.00 or imprisonment for up to 5 years, or both. 18 U.S.C. 152 and 3571

Form B6A

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE A - REAL PROPERTY

Except as directed below, list all real property in which the debtor has any legal, equitable or future interest, including all property owned as a co-tenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether hisband, wife or both own the property by placing an 'H', 'W', 'J' or 'C' in the column labeled 'Husband, Wife, Joint or Community.' If the debtor holds no

interest in real property, write 'None' under 'Description and

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G – Executory Contracts and Unexpired Leases.

If any entity claims to have a lien or hold a secured interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write 'None' in the column labeled 'Amount of Secured Claim.'

If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C – Property Claimed as Exempt.

Description _Location of Proper	Nature of Debtor's Interest In Property
Homestead	
[Home Address Omitted]	**Mortgage**
Husband, Wife, Joint Or Community	Amount of Secured Claim
Current Market Value of Debtor's Interest in Property without Deducting any secure claim or exemption	$56,000.00
$67,900.00	
Total: $67,900.00	
(Report also on Summary of Schedules.	

Form B6B

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE B – PERSONAL PROPERTY

Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an "X" in the appropriate position in the column labeled "None". If additional space is needed in any category attach a separate sheet properly identified with the case name, case number, and the number of the category. If the debtor is married, state whether husband, wife or both own the property by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint or Community". If the debtor is an individual or a joint petition is filed, states the amount of any exemptions claimed only in Schedule C – Property Claimed as Exempt.

Do not list interests in executory contracts and enexpired leases on this schedule. List them in Schedule G – Executory Contracts and Unexpired Leases.

If the property is being held for the debtor by someone else, state that person's name and address under "Description and Location of Property".

Type of Property	None	
Description and Location of Property	Husband, Wife, Joint Or Community	
	Current Market Value of Debtor's Interest in Property without Deducting any secure claim or exemption	
1. Cash on Hand	☑	
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.	☐	See Attachment
3. Security Deposits with public utilities, telephone companies, landlords, and others.	☑	
4. Household goods and furnishings, including audio, video, and computer equipment.	☐	See Attachment
5. Books, pictures and other art objects, antiques, stamp, coin, record, tape, compact discs, and other collections or collectibles.	☑	
6. Wearing Apparel	☐	See Attachment
7. Furs and Jewelry	☑	

8. Firearms and sports, photographic, and other hobby equipment.	☑	
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	☑	
10. Annuities. Itemize and name each issuer.	☑	
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.	☐	See Attachment
12. Stock and interests in incorporated and unincorporated businesses. Itemize.	☑	
13. Interests in partnerships or joint ventures. Itemize.	☑	
14. Government and corporate bonds and other negotiable and non negotiable instruments.	☑	
15. Accounts Receivable.	☑	
16. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	☑	
17. Other liquidated debts owing debtor including tax refunds. Give particulars.	☑	
18. Equitable or future interests, life estates, and rights or powers exercisable for the	☑	

benefit of the debtor other than those listed in Schedule of Real Property.		
19. Contingent and noncontingent interests in estate of a decedent, death benefit plan life insurance policy, or trust.	☑	
20. Other contingent and unliquidated claims of every nature, including tax refunds counter claims of the debtor and rights to setoff claims. Give estimated value of each.	☑	
21. Patents, copyrights, and other intellectual property. Give particulars.	☑	
22. Licenses, franchises, and other general intangibles. Give particulars.	☑	
23. Automobiles, trucks, trailers, and other vehicles.	☐	See Attachment
24. Boats, motors, and accessories.	☑	
25. Aircraft and accessories.	☑	
26. Office equipment, furnishings, and supplies.	☑	
27. Machinery, fixtures, equipment and supplies used in business.	☑	
28. Inventory.	☑	

29. Animals.	☑	
30. Crops – growing or harvested. Give particulars.	☑	
31. Farming equipment and implements.	☑	
32. Farm supplies, chemicals, and feed.	☑	
33. Other personal property of any kind not already listed. Itemize.	☑	

23	2000 Mazda 626	$5,000.00
4	Household Goods	$7,500.00
6	Wearing Apparel	$4,000.00
2	Checking/Savings Kansas CU	$50.00
2	Checking/Savings Kaw Valley	$50.00
2	Checking/Savings US Bank	$50.00
2	Checking/Savings Mary Kay Account US Bank	$3.00
11	Retirement 401 K	$14,000.00
	TOTAL:	$30,653.00

Form B6C

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE C – PROPERTY CLAIMED AS EXEMPT

Debtor elects the exemptions to which debtor is entitled under,

☐ 11 U.S.C. 522(b)(1) Exemptions provided in 11 U.S.C. 522(d). Note: These exemptions are available only in certain states.

☑ 11 U.S.C. 522(b)(2) Exemptions available under applicable nonbankruptcy federal, state, or local laws where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition, or for a longer portion of the 180 day period than in any other place, and the debtor's interest as a tenant by the entirely or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

Description of Property	Specify Law providing each exemption	Value of claimed exemption	Current market value of property without deducting exemption
Homestead [Home Address Omitted]	K.S.A. 60-2301	$56,000.00	$67,900.00

2000 Mazda 626	K.S.A. 60-2304	$5,000.00	$5,000.00
Household Goods	K.S.A. 60-2304	$7,500.00	$7,500.00
Wearing Apparel	K.S.A. 60-2304	$4,000.00	$4,000.00
Retirement 401 K	K.S.A. 60-2304	$14,000.00	$14,000.00

Form B6D

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE D –
CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding claims secured by property of the debtor as of the date of filing of the petition. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests. List creditors in alphabetical order to the extent practicable. If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an 'X' in the column labeled 'Codebtor', include the entity on the

appropriate schedule of creditors, and complete Schedule H – Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an 'H', 'W', 'J', or 'C' in the column labeled 'Husband, Wife, Joint, or Community'.

If the claim is contingent, place an 'X' in the column labeled 'Contingent'. If the claim is unliquidated, place and 'X' in the column l;abeled [sic] 'Unliquidated'. If the claim is disputed, place an 'X' in the column labeled 'Disputed'. (You may need to place an 'X' in more than one of these three columns.

Report the total of all claims listed on this schedule in the box labeled 'Total' on the last sheet of the completed schedule. Report this total also on the Summary of Schedules. Claim of exemption

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

Creditor's Name and Mailing Address, including Zip Code	Codebtor Husband, Wife, Joint or Community
Account No. **9900399472** **US Bank** **PO Box 20005** **Owensboro KY 42304-0005**	Date claim was incurred, Nature of Lien, and description and market value of property subject to lien. **Homestead.** **Claim: $56,000.** **Value: $67,900.** **To be paid: directly.**

Contingent
Unliquidated
Disputed

Amount of Claim without deducting value of collateral

$56,000.00

Value **$67,900.00**

Unsecured Portion if any

$0.00

Subtotal: **$56,000.00**
Total: **$56,000.00**

Form B6E

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE E – CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to property, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of this petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an 'X' in the

column labeled 'Codebtor', include the entity on the appropriate schedule of creditors, and complete Schedule H – Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an 'H', 'W', 'J', or 'C' in the column labeled 'Husband, Wife, Joint, or Community'.

If the claim is contingent, place an 'X' in the column labeled 'Contingent'. If the claim is unliquidated, place and 'X' in the column l;abeled [sic] 'Unliquidated'. If the claim is disputed, place an 'X' in the column labeled 'Disputed'. (You may need to place an 'X' in more than one of these three columns.

Report the total of all claims listed on this schedule in the box labeled 'Total' on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☑ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

Types of Priority Claims (Check the appropriate boxes below if claims are listed in that category on the attached

☐ **Extensions of Credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for reli [sic] 11 U.S.C. 507(a)(2)

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees, up to a maximum of $2000.00 per employee, earned within 90 days immediately p [sic] the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. 507(a)(3)

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, t [sic] provided in 11 U.S.C. 507(a)(4).

☐ **Certain farmers and fisherman**

Claims of certain farmers and fisherman, up to a maximum of $2000.00 per farmer or fisherman, against the debtor, as provided in 11 U.S.C. (a)(5).

☐ **Deposits by individuals**

Claims of individuals up to a maximum of $900.00 for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provi [sic] 11 U.S.C. 507(a)(6).

☑ **Taxes and Other Certain Debts Owed to Governmental**

Taxes, custom duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. 507(a)(7).

Creditor's Name and Mailing Address, including Zip Code	Codebtor Husband, Wife, Joint or Community
Account No.	Date claim was incurred and consideration for claim
Contingent Unliquidated Disputed	Amount entitled to Priority
Total Amount of Claim	
$0.00	**$0.00**

Subtotal (Total of this page)	**$0.00**
Total (Use only on last page)	**$0.00**

Form B6F

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE F – CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and account number, if any, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. Do not include claims listed in Schedule D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an 'X' in the column labeled 'Codebtor', include the entity on the appropriate schedule of creditors, and complete Schedule H – Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an 'H', 'W', 'J', or 'C' in the column labeled 'Husband, Wife, Joint, or Community'.

If the claim is contingent, place an 'X' in the column labeled 'Contingent'. If the claim is unliquidated, place and 'X' in the column l;abeled 'Unliquidated'. If the claim is disputed, place an 'X' in the column labeled 'Disputed'. (You may need to place an 'X' in more than one of these three columns.

Report the total of all claims listed on this schedule in the box labeled 'Total' on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured nonpriority claims to report on this Schedul

Creditor's Name and Mailing Address, including Zip Code

Codebtor

Husband, Wife, Joint or Community

Date claim was incurred and consideration for claim

Contingent
Unliquidated
Disputed

Total Amount of Claim

If claim is subject to setoff, so state

Account No. **$37.00**

Cardmember Service
PO Box 6342
Fargo ND 58125

Account No. [Financial Account Number Omitted] **$845.74**

Chase
Cardmember Service
PO Box 94014
Palatine IL 60094

Account No. [Financial Account Number Omitted] **$7,053.05**

Citi Cards
PO Box 6416
The Lakes NV 88901

Account No. [Financial Account Number Omitted] **$6,788.29**

CitiFinancial
PO Box 6931
The Lakes NV 88901

Account No. [Financial Account Number Omitted] **$3,299.04**

First Bankcard
PO Box 2951
Omaha NE 68103

Account No.	**$125.00**
Housing & Credit Counseling **1195 SW Buchanan** **Topeka KS 66604**	
Account No. [Financial Account Number Omitted]	**$693.58**
Kohls Payment Center **PO Box 2983** **Milwaukee WI 53201**	
Account No. [Financial Account Number Omitted]	**$16,972.74**
MBNA America **PO Box 15289** **Wilmington DE 19886**	
Subtotal (Total of this page)	**$35,814.44**
Account No. [Financial Account Number Omitted]	**$428.97**
MetroStyle **PO Box 659728** **San Antonio TX 78265**	
Account No. [Financial Account Number Omitted]	**$77.50**
Sheri Parker LSCSW **PO Box 750136** **Topeka KS 66675**	
Account No. [Financial Account Number Omitted]	**$135.91**
St Francis Health Center **1700 SW 7th St** **Topeka KS 66606**	

Account No. [Financial Account Number Omitted] **$336.54**

Victorias Secret
PO Box 659728
San Antonio TX 78265

Subtotal (Total of this page) **$978.92**

Total (Use only on last page) **$36,793.36**

Form B6G

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE G – EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any time share interests.

State nature of debtor's interest in contract, i.e. 'Purchaser', 'Agent', etc. State whether debtor is the lessor or lessee of a lease.

Provide the names and complete mailing addresses of all other parties to each lease or contract described.

NOTE: A party listed on this schedule will not receive notice of the filing of this unless the party is also scheduled in the appropriate schedule of creditors.

☑ Check this box if debtor has no executory contracts or unexpired leases.

Name and Mailing address, including zip code, of other parties to lease or contract	Description of contract or lease and nature of debtor's interest. State whether lease is for nonresidential real property. State contract number of any government contract.

Form B6H

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE H - CODEBTORS

Provide the information requested concerning any person or entity, other than a spouse in a joint case, that is also liable on any debts listed by debtor in the schedules of creditors. Include all guarantors and cosigners. In community property states, a married debtor not filing a joint case should report the name and address of the nondebtor spouse on this schedule. Include all names used by the nondebtor spouse during the six years immediately preceding the commencement of this case.

☑ Check this box if debtor has no codebtors.

Name and address of Codebtor	Name and address of creditor

Form B6I

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by a married debtor in a chapter 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and joint petition is not filed.

Debtor Marital Status	**EMPLOYMENT:**	Debtor	Spouse
S	Occupation Name of Employer	**JoAnn's Fabric**	
	How Long Employed	**9 Month(s)**	
	Address of Employer	**1221 SW Gage** **Topeka KS 66604-**	

DEPENDENTS OF DEBTOR AND SPOUSE			
Names	Age	Relationship	
Income: (Estimate of average monthly income)		DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (pro rate if not paid mo		**$2,678.00**	**$0.00**
SUBTOTAL		**$2,678.00**	**$0.00**
LESS PAYROLL DEDUCTIONS			

a. Payroll taxes and social security	**$695.00**	**$0.00**
b. Insurance	**$91.00**	**$0.00**
c. Union dues	**$0.00**	**$0.00**
d. Other (specify)	**$0.00**	**$0.00**
SUBTOTAL OF PAYROLL DEDUCTIONS	**$0.00**	**$0.00**
TOTAL NET MONTHLY TAKE HOME PAY	**$1,892.00**	**$0.00**
Annualized income from tax refunds and earned income credits	**$0.00**	**$0.00**
Regular income from operation of business or profession	**$0.00**	**$0.00**
Interest and dividends	**$0.00**	**$0.00**
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above	**$0.00**	**$0.00**
Social security or other government assistance (Specify)	**$0.00**	**$0.00**
Pension or retirement income	**$0.00**	**$0.00**

Other monthly income		
(Specify) **Mary Kay**	**$30.00**	**$0.00**
(Specify)	**$0.00**	**$0.00**
TOTAL MONTHLY INCOME	**$0.00**	**$0.00**
TOTAL COMBINED MONTHLY INCOME (Report also on Summary of Schedules)		**$1,922.00**

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document:

Form B6J

In re: **Stephanie Lanning** Case No.

Debtor(s)

SCHEDULE J – CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Complete this schedule by estimating the average monthly expenses of the debtor and the debtor's family. Pro rate any payments made biweekly, quarterly, semiannually, or annually to show monthly rate.

☐ Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse".

Rent or home mortgage payment (Include lot rented for mobile home)	**$556.00**
Are real estate taxes included? Yes ☑ No ☐	
Is property insurance included? Yes ☑ No ☐	
UTILITIES	
Electric and heating fuel	**$180.00**
Water and sewer	**$40.00**
Telephone	**$150.00**
Other	
Home Maintenance (Repairs and upkeep)	**$50.00**
Food	**$275.00**
Clothing	**$75.00**
Laundry and dry cleaning	**$20.00**
Medical and dental expenses	**$75.00**
Transportation (not including car payments)	**$75.00**
Recreation, clubs and entertainment, newspapers, magazines, etc.	**$100.00**
Charitable contributions	**$25.00**
Insurance (not deducted from wages or included in home mortgage payments)	
Homeowner's or renter's	**$0.00**
Life	**$26.97**
Health	**$0.00**
Auto	**$75.00**
Other	

Taxes (not deducted from wages or included in home mortgage payments) (Specify)		**$0.00**
Installment payments (In chapter 12 and 13 cases, do not list payments to be included in the plan)		**$0.00**
Auto		
Other	**cable**	**$50.00**
Other		**$0.00**
Alimony, maintenance and support paid to others		**$0.00**
Payments for support of additional dependents not living at your home Regular expenses from operation of business, profession or farm (attach detailed statement)		
Other		**$0.00**
TOTAL MONTHLY EXPENSES (Report also on Summary of Schedules)		**$1,772.97**

(FOR CHAPTER 12 DEBTORS ONLY)

Provide the information requested below, including whether plan payments are to be made biweekly, monthly, annually or at some other regular interval.

A.	Total Projected monthly income	**$1,922.00**
B.	Total projected monthly expenses	**$1,772.97**
C.	Excess income (A minus B)	**$149.03**
D.	Total amount to be paid into plan each **Month** (Interval)	**$144.00**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

In re: **Stephanie Lanning** Case No.
Debtor(s) Chapter **13**

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts from Schedules D, E and F to determine the total amount of debtor's liabilities.

NAME OF SCHEDULE	Attached (Yes/No)	NO OF SHEETS	AMOUNTS SCHEDULES ASSETS	LIABILITIES	OTHER
A - Real Property	YES	1	$67,900.00		
B - Personal Property	YES	2	$30,653.00		
C - Property Claimed as Exempt	YES	1			
D - Creditors holding Secured Claims	YES	1		$56,000.00	
E - Creditors holding Unsecured Priority Claims	YES	1		$0.00	
F - Creditors holding Unsecured Nonpriority Claims	YES	2		$36,793.36	
G - Executory Contracts and Unexpired Leases	YES	1			
H - Codebtors	YES	1			
I - Current Income of Individual Debtor(s)	YES	1			$1,922.00
J - Current Expenditures of Individual Debtor(s)	YES	1			$1,772.97
Total number of sheets in ALL schedules		12			
			Total Assets $98,553.00		
				Total Liabilities $92,793.36	

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

Form 6-Summ2 (10/05) Case No.

In re: **Stephanie Lanning** Chapter **13**
Debtor(s)

STATISTICAL SUMMARY OF CERTAIN LIABILITIES

(28 U.S.C. § 159)
[Individual Debtors Only]

Summarize the following types of liabilities, as reported in the Schedules, and total them.

Type of Liability	Amount
Domestic Support Obligations (from Schedule [sic]	$0.00
Taxes and Certain Other Debts Owed to Governmental Units (from Schedu [sic]	$0.00
Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedu [sic]	$0.00
Student Loan Obligations (from Schedule F)	$0.00
Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedul [sic]	$0.00
Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F)	$0.00
TOTAL	$0.00

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I decalre under penalty of perjury that I have read the foregoing summary and schedules 13 sheets, (Total shows on summary page plus 1) and that they are true and correct to the best knowledge, information and belief.

Date **10/16/2006** Signature **s/Stephanie Kay Lanning**
Stephanie Kay Lanning

Date _____ Signature _____
(Joint Debtor, if any)

[If joint case, both spouses must sign]

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF CORPORATION OR PARTNERSHIP

I, the _____ [the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership] of the _____ [corporation or partnership] named as debtor in this case, declare under penalty of perjury that I have read the following summ [sic] summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information and belief.

Date _____ Signature _____

Print or type name of individual signing on behalf of debtor

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor

[Penalty for making a false statement or concealing property. Fine of up to $500,000.00 or imprisonment for up to 5 years or both. 18 U.S.C. 152 and 3571.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

Form B3 Case No.

In re: **Stephanie Lanning** Chapter **13**
Debtor(s)

STATEMENT PURSUANT TO RULE 2016(b)

The undersigned, pusuant to Rule 2016(b) Bankruptcy Rules, states that:

(1) The undersigned is the attorney for the debtor(s) in this case.

Michael F. Brunton

(2) The compensation paid or agreed to be paid by the debtor(s) to the undersigned is:

(a) for legal services rendered or to be rendered in contemplation of and in connection with this case **$2,500.00**

(b) prior to filing this statement, debtor(s) have paid **$0.00**

(c) the unpaid balance due and payable is **$2,500.00**

(3) **$54.00** of filing fee in this case has been paid.

(4) The services rendered or to be rendered include the following:

(a) analysis of the financial situation, and rendering advice and assistance to the debtor(s) in determining whether to file a petition under title 11 of the United States Code

(b) preparation and filing of the petition, schedules, statement of financial affairs and other documents required by the court.

(c) representation of the debtor(s) at the meeting of creditors.

(5) The source of payments made by the debtor(s) to the undersigned was from earnings, wages and compensation for services performedn and

(6) The source of payments to be made by the debtor(s) to the undersigned for the unpaid balance remaining, if any, will be from earnings, wages and compensation for services performed, a

To be paid through the plan.

(7) The undersigned has received no transfer, assignment or pledge of property except the following for the value stated.

$20.00 for the cost of printing documents

(8) The undersigned has not shared or agreed to share with any other entity, other than with members of undersigned's law firm, any compensation paid or to be paid except as follows:

Date **10/16/2006**

Respectfully submitted,: **s/ Michael F. Bunton**
Attorney for Petitioner

Attorney's name and address
Michael F. Bunton
Jayhawk Tower
700 SW Jackson,
Roof Garden Suite
Topeka KS 66603-3731

Revised Statement of Compensation: Rule 2016(b)

VERIFICATION OF CREDITOR MATRIX

The above named debtor verifies that the attached matrix is true and correct to the best of the debtor's knowledge.

Date **10/16/2006** s/ **Stephanie Kay Lanning**
Debtor
Stephanie Kay Lanning

s/ _____
(Joint Debtor, if any)

Cardmember Service
PO Box 6342
Fargo ND 58125

Chase
Cardmember Service
PO Box 94014
Palatine IL 60094

Citi Cards
PO Box 6416
The Lakes NV 88901

CitiFinancial
PO Box 6931
The Lakes NV 88901

First Bankcard
PO Box 2951
Omaha NE 68103

Housing & Credit Counseling
1195 SW Buchanan
Topeka KS 66604

Kohls Payment Center
PO Box 2983
Milwaukee WI 53201

MBNA America
PO Box 15289
Wilmington DE 19886

MetroStyle
PO Box 659728
San Antonio TX 78265

Sheri Parker
LSCSW PO Box 750136
Topeka KS 66675

St Francis Health Center
1700 SW 7th St
Topeka KS 66606

US Bank
PO Box 20005
Owensboro KY 42304-0005

Victorias Secret
PO Box 659728
San Antonio TX 78265

Form B22C(Alt.) (Chapter 13) (10/05)

In RE: Stephanie Lanning
Debtor(s)

Case No.:

☐ The applicable commitment period is 3 years.
☑ The applicable commitment period is 5 years.
☑ Disposable income determined under 1325(b)(3)
☐ Disposable income not determined under 1325(b)(3)

STATEMENT OF CURRENT MONTHLY INCOME AND DISPOSABLE INCOME CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

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Part I. CALCULATION OF CURRENT MONTHLY INCOME

		Column A Debtor	Column B Spouse
1	Marital/filing status ☐ Unmarried ☐ Married, filing jointly. Complete both Column A (Debtor's Income") and Column B (Spouse's Income) for Lines 3-11. All figures must reflect average monthly income for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on		
2	Gross wages, salary, tips, bonuses, overtime, commissions.	$5,343.70	$0.00
3	Income for the operation of a business, profession, or farm. Debtor Gross receipts $0.00 Ordinary and necessary business expenses $0.00 Business income	$0.00	$0.00
4	Rent and other real property income. Rental receipts $0.00 Rental expenses $0.00 Rental income	$0.00	$0.00
5	Interest, dividends, and royalties.	$0.00	$0.00
6	Pension and retirement	$0.00	$0.00
7	Regular contributions to the household expenses of the debtor or the debtor's dependents, including child or spousal support.	$0.00	$0.00
8	Unemployment compensation. Enter the amount in Column A and, if applicable, Column B. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act Debtor $ Spouse $	$0.00	$0.00

9	Income from all other sources	a. b.	$0.00 $0.00	
10	Subtotal of current monthly income		$5,343.70	$0.00
11	Total current monthly income.		$5,343.70	

Part II. APPLICATION OF § 1325(b)(3)

12	Enter the Amount form Line11.	$5,343.70
13	Marital Adjustment. If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT regularly contributed to the household expenses of you or your dependents. Otherwise, enter zero.	$0.00
14	Subtract Line 13 from Line 12 and enter the result.	$5,343.70
15	Annualized current monthly income for § 1325(b)(4). Multiply the amount from Line 14 by the number 12 and enter the result.	$64,124.34
16	Applicable median family income. Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor state of residence: b. Enter debtor household size: 1	$36,631.00

17 Application of § 1325(b)(4). Check the applicable box and proceed as directed.

☐ The amount on Line 15 is less than or equal to the amount on Line 16. Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and complete Part VII of this statement. Do not complete Parts III, IV, V or VI.

☑ The amount on Line 15 is more than or equal to the amount on Line 16. Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with Part III of this statement.

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE

18	Enter the Amount form Line11.	$5,343.70
19	Marital Adjustment. If you are married, but are not filing jointly with your spouse, enter the amount of income listed in Line 10, Column B that was NOT regularly contributed to the household expenses of you or your dependents. If you are married or married and filing jointly with your spouse, enter zero.	$0.00
20	Current monthly income for § 1325(b)(3). Subtract Line 19 from Line 18 and enter the result.	$5,343.70
21	Annualized current monthly income for § 1325(b)(3). Multiply the amount from Line 20 by the number 12 and enter the result.	$64,124.34
22	Applicable median family income. Enter the amount from Line 16.	$36,631.00

23 Application of § 1325(b)(4). Check the applicable box and proceed as directed.

☑ The amount on Line 21 is more than the amount on Line 22. Check the box for "Disposable Income is determined under § 1325(b)(3)." at the top of page 1 of this statement and complete the remaining parts of this statement.

☐ The amount on Line 21 is not more than the amount on Line 22. Check the box for "Disposable Income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and continue with Part VII of this statement. Do not complete Parts IV, V or VI.

Part IV. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service

24	National Standards: food, clothing, household supplies, personal care, and miscellaneous. Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$691.00
25A	Local Standards: housing and utilities; non-mortgage expenses Enter amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available t www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$317.00
25B	Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family s(this information is available at www.usdoj.gov/ust/ or form the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. Do not enter an amount less than zero.	
	a. IRS Housing and Utilities Standards; mortgage/rental expense	$566.00
	b. Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$0.00
	c. Net mortgage/rental expense Subtract Line b from Line a	$566.00
26	Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:	$0.00

27 Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

ck the number of vehicles for which you pay the operating expenses or for which the operating enses are included as a contribution to our household exenses in Line 7. ☐0 ☑1 ☐2

Enter the amoun from IRS Transportation Standards, Operating Costs Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) $251.00

28 Local Standards: transportation ownership/lease expense; Vehicle 1. Enter the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)

☑1 ☐2 or more

Enter, in Line a below, the amount from IRS Transportation Standards, Ownership Costs, First Car. (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Enter in Line b the total of that Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 38 subtract Line b from Line a and enter the result in Line 19. Do not enter an amount less than zero.

a.	IRS Transportation Standards, Ownership Costs, First Car	$475.00
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 38	$251.00
c.	Net ownership/lease expense for Vehicle 1	$224.00

29 Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 20

Enter, in Line a below, the amount from IRS Transportation Standards, Ownership Costs, Second Car. available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). Enter in Line b the total of that Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 38 subtract Line b from Line a and enter the result in Line 20. Do not enter an amount less than zero.

a.	IRS Transportation Standards, Ownership Costs, First Car	$0.00
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 38	$0.00
c.	Net ownership/lease expense for Vehicle 2	$0.00

30 Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self em-ployment taxes, social security taxes, and Medicare taxes. Do not include real estate or sales $1,539.00

31	Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.	$42.00
32	Other Necessary Expenses: life insurance. Enter average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums on your dependents, for whole life or for any other form of insurance. $	$0.00
33	Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. Do not include payments on past due support obligations included in	$0.00
34	Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$0.00
35	Other Necessary Expenses: childcare. Enter the average monthly amount that you actually expend on childcare. Do not include payments made for children's education	$0.00
36	Other Necessary Expenses: health care. Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. Do not include payments for health insurance listed in Line 39.	$0.00
37	Other Necessary Expenses: telecommunication services. Enter the average monthly expenses that you actually pay for cell phones, pagers, call waiting, caller identification, special long distance, or internet services necessary for the health and welfare of you or your dependents. Do not include any amount previously deducted.	$0.00
38	Total Expenses Allowed under IRS Standards. Enter the total of Lines 24 through 37.	$3,881.00

Subpart B: Additional Expense Deductions under § 707(b)

Note: Do not include anenses that ou have listed in Lines 24-37

39	Health Insurance, Disability Insurance and Health Savings Account Expenses. List the average monthly amounts that you actually expend in each of the folowing categories and enter the total.		
	a. Health Insurance	$0.00	
	b. Disability Insurance	$0.00	
	c. Health Savings Account	$0.00	$0.00

40	Continued contributions to the care of household or family members. Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an dery, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. Do not include payments listed in Line 34.	$0.00
41	Protection against family violence. Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law.	$0.00
42	Home energy costs in excess of the allowance specified by the IRS Local Standards. Enter the average monthly amount by which your home energy costs exceed the allowance in the IRS Local Standards for Housing and Utilities. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	$0.00
43	Education expenses for dependent children under 18. Enter the average monthly expenses that you actually incur, not to exceed $125 per chid, in providing elementary and secondary education for your dependent children less than 18 years of age. You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.	$0.00
44	Additional food and clothing expense. Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.	$0.00
45	Continued charitable contributions. Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable oranization as defined in 26 U.S.C. 170(c)(1)-(2)	$0.00
46	Total Additional Expense Deductions under § 707(b). Enter the total of Lines 39 through 45.	$0.00

Subpart C: Deductions for Debt Payment

47	Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Do not include items you have previously deducted, such as insurance and taxes.		
	Name of Creditor	Property Securing the Debt	60-month Average Payment	$333.60

48 Past due payments on secured claims. If any of the debts listed in Line 38 are in default, and the property securing the debt is necessary for your support or the support of your dependents, you may include in your deductions 1/60th of the amount that you must pay the creditor as a result of the default (the "cure amount") in order to maintain possession of the property. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.

Name of Creditor	Property Securing the Debt	1/60th of the Cure	
			$0.00

49 Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $0.00

50 Chapter 13 administrative expenses. Multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$144.00
b.	Current multiplier for your district as determined under b. schedules issued by the Executive Office for United States 50 Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	
c.	Average monthly administrative expense of Chapter 13 case	$14.11

51 Total Deductions for Debt Payment. Enter the total of Lines 47 through 50. $347.71

Subpart D: Total Deductions Allowed under § 707(b)(2)

52 Total of all deductions allowed under § 707(b)(2) Enter the total of Lines 38 46, and 51. $4,228.71

Part VI. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53 Total current monthly income. Enter the amount from Line 20. $5,343.70

54 Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child. $0.00

55 Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19). $0.00

56 Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 52. $4,228.71

57 Total adjustments to determine disposable income. Add the amounts on Lines 54, 55, and 56 and enter the result. $4,228.71

58 Monthly Disposable Income Under § 1325(b)(2). Subtract Line 57 from Line 53 and enter the result. $1,114.98

Part VI: ADDITIONAL EXPENSE CLAIMS

59 Other Expenses. List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

Expense Description | Monthly Amount

Part VII: VERIFICATION

60 I declare under penalty of perjury that the information provided in this statement is true and correct. (If this a joint case, both debtors must sign.)

Date **10/16/2006** Signature **/s/ Stephanie Kay Lanning**
Debtor

Date **10/16/2006** Signature **/s/**
Joint Debtor, if any

Form 22 Continuation Sheet

Income Month 1			**Income Month 2**		
Gross wages, salary, tips . . .	$2,472.30	$0.00	Gross wages, salary, tips . . .	$905.80	$0.00
Income from business . . .	$0.00	$0.00	Income from business . . .	$0.00	$0.00
Rents and real property income	$0.00	$0.00	Rents and real property income	$0.00	$0.00
Interest, dividends . . .	$0.00	$0.00	Interest, dividends . . .	$0.00	$0.00
Pension, retirement . . .	$0.00	$0.00	Pension, retirement . . .	$0.00	$0.00
Contributions to HH Exp . . .	$0.00	$0.00	Contributions to HH Exp . . .	$0.00	$0.00
Other Income . . .	$0.00	$0.00	Other Income . . .	$0.00	$0.00
Income Month 3			**Income Month 4**		
Gross wages, salary, tips . . .	$753.49	$0.00	Gross wages, salary, tips . . .	$584.13	$0.00
Income from business . . .	$0.00	$0.00	Income from business . . .	$0.00	$0.00
Rents and real property income	$0.00	$0.00	Rents and real property income	$0.00	$0.00
Interest, dividends . . .	$0.00	$0.00	Interest, dividends . . .	$0.00	$0.00
Pension, retirement . . .	$0.00	$0.00	Pension, retirement . . .	$0.00	$0.00
Contributions to HH Exp . . .	$0.00	$0.00	Contributions to HH Exp . . .	$0.00	$0.00
Other Income . . .	$0.00	$0.00	Other Income . . .	$0.00	$0.00
Income Month 5			**Income Month 6**		
Gross wages, salary, tips . . .	$15,356.42	$0.00	Gross wages, salary, tips . . .	$11,990.03	$0.00
Income from business . . .	$0.00	$0.00	Income from business . . .	$0.00	$0.00
Rents and real property income	$0.00	$0.00	Rents and real property income	$0.00	$0.00
Interest, dividends . . .	$0.00	$0.00	Interest, dividends . . .	$0.00	$0.00
Pension, retirement . . .	$0.00	$0.00	Pension, retirement . . .	$0.00	$0.00
Contributions to HH Exp . . .	$0.00	$0.00	Contributions to HH Exp . . .	$0.00	$0.00
Other Income . . .	$0.00	$0.00	Other Income . . .	$0.00	$0.00

Additional Items as Designated, if any

Remarks

B 201 (04/09/06)

UNITED STATES BANKRUPTCY CODE

NOTICE TO INDIVIDUAL CONSUMER DEBTOR UNDER § 342(b) OF THE BANKRUPTCY CODE

In accordance with § 342(b) of the Bankruptcy Code, this notice: (1) Describes briefly the services available from credit counseling services; (2) Describes briefly the purposes, benefits and costs of the four types of bankruptcy proceedings you may commence; and (3) Informs you about bankruptcy crimes and notifies you that the Attorney General may examine all information you supply in connection with a bankruptcy case. You are cautioned that bankruptcy law is complicated and not easily described. Thus, you may wish to seek the advice of an attorney to learn of your rights and responsibilities should you decide to file a petition. Court employees cannot give you legal advice.

1. <u>Services Available from Credit Counseling Agencies</u>

With limited exceptions, § 109(h) of the Bankruptcy Code requires that all individual debtors who file for bankruptcy relief on or after October 17, 2005, receive a briefing that outlines the available opportunities for credit counseling and provides assistance in performing a budget analysis. The briefing must be

given within 180 days ***before*** the bankruptcy filing. The briefing may be provided individually or in a group (including briefings conducted by telephone or on the Internet) and must be provided by a nonprofit budget and credit counseling agency approved by the United States trustee or bankruptcy administrator. The clerk of the bankruptcy court has a list that you may consult of the approved budget and credit counseling agencies.

In addition, after filing a bankruptcy case, an individual debtor generally must complete a financial management instructional course before he or she can receive a discharge. The clerk also has a list of approved financial management instructional courses.

2. The Four Chapters of the Bankruptcy Code Available to Individual Consumer Debtors

***Chapter* 7: Liquidation ($245 filing fee, $39 administrative fee, $15 trustee surcharge: Total fee $299)**

1. Chapter 7 is designed for debtors in financial difficulty who do not have the ability to pay their existing debts. Debtors whose debts are primarily consumer debts are subject to a "means test" designed to determine whether the case should be permitted to proceed under chapter 7. If your income is greater than the median income for your state of residence and family size, in some cases, creditors have the right to file a motion requesting that the court

dismiss your case under § 707(b) of the Code. It is up to the court to decide whether the case should be dismissed.

2. Under chapter 7, you may claim certain of your property as exempt under governing law. A trustee may have the right to take possession of and sell the remaining property that is not exempt and use the sale proceeds to pay your creditors.

3. The purpose of filing a chapter 7 case is to obtain a discharge of your existing debts. If, however, you are found to have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge and, if it does, the purpose for which you filed the bankruptcy petition will be defeated.

4. Even if you receive a general discharge, some particular debts are not discharged under the law. Therefore, you may still be responsible for most taxes and student loans; debts incurred to pay nondischargeable taxes; domestic support and property settlement obligations; most fines, penalties, forfeitures, and criminal restitution obligations; certain debts which are not properly listed in your bankruptcy papers; and debts for death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs. Also, if a creditor can prove that a debt arose from fraud, breach of fiduciary duty, or theft, or from a willful and malicious injury, the bankruptcy court may determine that the debt is not discharged.

***Chapter 13*: Repayment of All or Part of the Debts of an Individual with Regular Income ($235 filing fee, $39 administrative fee: Total fee $274)**

1. Chapter 13 is designed for individuals with regular income who would like to pay all or part of their debts in installments over a period of time. You are only eligible for chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code.

2. Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them, using your future earnings. The period allowed by the court to repay your debts may be three years or five years, depending upon your income and other factors. The court must approve your plan before it can take effect.

3. After completing the payments under your plan, your debts are generally discharged except for domestic support obligations; most student loans; certain taxes; most criminal fines and restitution obligations; certain debts which are not properly listed in your bankruptcy papers; certain debts for acts that caused death or personal injury; and certain long term secured obligations.

***Chapter 11*: Reorganization ($1000 filing fee, $39 administrative fee: Total fee $1039)**

Chapter 11 is designed for the reorganization of a business but is also available to consumer debtors. Its

provisions are quite complicated, and any decision by an individual to file a chapter 11 petition should be reviewed with an attorney.

***Chapter 12*: Family Farmer or Fisherman ($200 filing fee, $39 administrative fee: Total fee $239)**

Chapter 12 is designed to permit family farmers and fishermen to repay their debts over a period of time from future earnings and is similar to chapter 13. The eligibility requirements are restrictive, limiting its use to those whose income arises primarily from a family-owned farm or commercial fishing operation.

3. Bankruptcy Crimes and Availability of Bankruptcy Papers to Law Enforcement Officials

A person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury, either orally or in writing, in connection with a bankruptcy case is subject to a fine, imprisonment, or both. All information supplied by a debtor in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the United States Trustee, the Office of the United States Attorney, and other components and employees of the Department of Justice.

WARNING: Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information regarding your creditors, assets, liabilities, income,

expenses and general financial condition. Your bankruptcy case may be dismissed if this information is not filed with the court within the time deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

Certificate of [Non-Attorney] Bankruptcy Petition Preparer

I, the [non-attorney] bankruptcy petition preparer signing the debtor's petition, hereby certify that I delivered to the debtor this notice required by § 342(b) of the Bankruptcy Code.

_____

Printed name and title, if any, of Bankruptcy Petition Preparer

_____

Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

Address:

_____

X _____

Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Certificate of the Debtor

I (We), the debtor(s), affirm that I (we) have received and read this notice.

Printed Name(s) of Debtor(s)

X s/ Stephanie Lanning 10/3/06
Signature of Debtor Date

X _____
Signature of Joint Debtor (if any) Date

Case No. (if known) _____

Michael F. Brunton
Attorney at Law #10901
Jayhawk Tower
700 SW Jackson, Roof Garden Suite
Topeka, Kansas 66603
(785) 233-5117

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

In RE:	
Stephanie Kay Lanning Debtor(s)	Case No:

CHAPTER 13 PLAN

(Filed Oct. 16, 2006)

DEBTOR(s):	[Social Security Number Omitted]
Stephanie Kay Lanning	[Social Security Number Omitted]
	[Home Address Omitted]
	Topeka KS 66604
PLAN PAYMENT:	**$144.00**
	To be paid by Debtor
To be made every:	Month
Estimated Plan Length:	36

ADMINISTRATIVE:

Attorney fees shall be paid, at a set monthly payment, over 24 months or sooner if there are no secured creditors. In the event that this case is dismissed prior to confirmation, the Trustee shall pay to Debtor(s)' attorney any monies paid to the Trustee, excepting monies applied to the filing fees.

Proposed pre-confirmation
Attorney fees: **$2,500.00**
Fees paid by Debtor(s) to the Attorney: **$0.00**
Balance of Fees to be paid through
the Plan: **$2,500.00**

FILING FEES:

Amount paid: **$54.00**
To be paid through the plan: **$220.00**

SECURED:

(Retain lien 11 U.S.C. 1325 (a)(5)) Secured creditors, other than those secured only by a mortgage on the debtor'(s) homestead, will, unless otherwise specified, be paid the value of the collateral listed in the plan, or the amount in the claim, whichever is lower, at a court-determined discount rate of interest applicable at time of filing or the contract rate of interest, whichever is lower.

Creditor	Value	Arrears	Minimum Monthly Payments	Interest Rate
US Bank	$67,900.00	$0.00	$0.00	0.00%

Homestead. Claim: $56,000. Value: $67,900.
To be paid: directly.

Collateral: Homestead Homest

PRIORITY:	Amount
	$0.00

SPECIAL CLASS:	Amount	To be paid
Housing & Credit Counseling	$125.00	$125.00

UNSECURED:

Creditors with general unsecured claims shall be paid any funds not necessary to satisfy administrative expenses, secured claims and priority claims within the initial 36 months of this plan. All plans must run a minimum of 36 months or pay all creditors filing claims 100%.

TERMINATION:

Plan shall terminate upon payment of the above, not less than 36 months or more than 60 months from the date of filing.

CHILD SUPPORT:

Future child support payments, if any, will not be paid through the Chapter 13 Plan.

AUTO INSURANCE PROVIDER:

SPECIAL PROVISIONS:

A. POST PETITION DEBT

Debtor(s) hereby reserves the right to modify this plan to include post petition debt pursuant to 11 USC 1322 (b)(6)

B. MORTGAGE PAYMENTS

Unless otherwise specified, mortgage payments shall be made directly. In the event the Debtor(s) is in arrears on the date of filing, the arrearage shall be paid through the plan without interest. The arrearage amount scheduled herein is estimated. The Trustee will pay the arrearage claim unless objected

to. If it has been the practice of the Mortgage Creditor to send monthly statements, coupons, etc to the Debtor(s) It shall continue to do so post-petition. Any request for attorney's fees by the mortgage creditor, whether initially, or in any subsequent action including motions for relief, must be accompanied by an itemized statement.

C. 401 K, TSP AND OTHER EMPLOYEE SAVINGS PROGRAM

Unless otherwise specified, Debtor(s) who are enrolled in 401 K, TSP or other employee savings programs shall continue to make contributions to those programs, and shall continue repayment of loans from those programs, during the pendency of the plan. These funds will be available from money which would otherwise be scheduled for entertainment, clothing and other miscellaneous expense, or alternatively will be available by extending the plan for a period longer than 36 months.

DATED: **10/16/2006** **s/Stephanie Kay Lanning**
Stephanie Kay Lanning

Official Form 1 (10/06) (Filed Nov. 1, 2006)

United States Bankruptcy Court **____ DISTRICT OF ____**	**Voluntary Petition**
Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec./Complete EIN or other Tax I.D. No. (if more than one, state all): **s/ Stephanie Lanning 10/3/06**	Last four digits of Soc. Sec./Complete EIN or other Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. and Street, City and State): ZIP CODE **66044**	Street Address of Debtor (No. and Street, City and State): ZIP CODE
County of Residence or of the Principal Place of Business: **Shawnee**	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE	

Type of Debtor (Form of Organization) (Check **one** box.)	**Nature of Business** (Check **one** box.)	**Chapter of Bankruptcy Code Under Which the Petition is Filed** (Check **one** box.)
☑ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form*	☐ Health Care Business	☐ Chapter 7
☐ Corporation (includes LLC and LLP)	☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)	☐ Chapter 9
☐ Partnership	☐ Railroad	☐ Chapter 11
☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)	☐ Stockbroker	☐ Chapter 12
	☐ Commodity Broker	☑ Chapter 13
	☐ Clearing Bank	☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
	☐ Other	☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding
_____	_____	_____

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Tax-Exempt Entity
(Check box, if applicable.)

☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Nature of Debts
(Check one box.)

☑ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred primarily for a personal, family, or household purpose."

☐ Debts are primarily business debts.

Filing Fee (Check one box.)

☐ Full Filing Fee attached.

☑ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.

☐ Filing Fee waiver requested (applicable Chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:

☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).

☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:

☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2 million.

Check all applicable boxes:

☐ A plan is being filed with this petition.

☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☑ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

1-49	50-99	100-199	200-999	1,000-5,000	5,001-10,000	10,001-25,000	25,001-50,000	50,001-100,000	Over 100,000
☑	☐	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Assets

$0 to $10,000	$10,000 to $100,000	$100,000 to $1 million	$1 million to $100 million	More than $100 million
☐	☑	☐	☐	☐

Estimated Liabilities

$0 to $50,000	$50,000 to $100,000	$100,000 to $1 million	$1 million to $100 million	More than $100 million
☐	☑	☐	☐	☐

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s): **Stephanie Kay Lanning**

All Prior Bankruptcy Cases Filed Within Last 8 Years
(If more than two, attach additional sheet.)

Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor
(If more than one, attach additional sheet.)

Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under Chapter 11.)

☐ Exhibit A is attached and made part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X

Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made part of this petition.

☐ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☑ Exhibit D completed and signed by the debtor is attached and made part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box.)

☑ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Statement by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____

(Name of landlord that obtained judgment)

_____

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s): **Stephanie Kay Lanning**

Signatures

Signature(s) or Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.

[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X **s/Stephanie Lanning**
Signature of Debtor

X
Signature of Joint Debtor

Telephone Number
(if not represented by attorney)

10/16/06
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only one box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X
(Signature of Foreign Representative)

(Printed Name of Foreign Represenative)

Date

Signature of Attorney

X **s/Michael F. Brunton**
Signature of Attorney for Debtor(s)

Michael F. Brunton
Printed Name of Attorney for Debtor(s)

Firm Name
Law Office of Michael F. Brunton

Address
700 SW Jackson,
Suite Rf Garden A, Topeka

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition

785/233-5117

Telephone Number

10/16/06

Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X

Signature of Authorized Individual

Printed Name of Authorized Individual

Title of Authorized Individual

Date

preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19B is attached.

Printed Name and title, if any, of Bankruptcy Petition Preparer

Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

Address

X

Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Michael F. Brunton
Attorney at Law #10901
Roof Garden A, Jayhawk Tower
700 S.W. Jackson
Topeka, KS 66603
(785) 233-5117

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

In Re:

Stephanie Kay Lanning

Debtor(s) Case No. 06-41037-13

MOTION TO DETERMINE THAT CHAPTER 13 STATEMENT OF CURRENT MONTHLY AND DISPOSABLE INCOME (FORM B22C) DOES NOT DETERMINE PLAN PAYMENT

(Filed Jan. 4, 2007)

COMES NOW, the Debtor and moves this Court for an Order to Determine that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does not Determine Plan Payment. In support of this motion, Debtor states as follows:

1. That Debtor filed for Chapter 13 Bankruptcy Relief on October 26, 2006.

2. That at that time, the Debtor had been employed by JoAnn's Fabric for approximately 9 months.

3. That Debtor's Schedule I indicates gross wages from JoAnn's Fabric of $2,678.00 per month in addition to $30 other monthly income from Mary Kay. Less $695 payroll taxes and $91 insurance, the Debtor's monthly net income is $1,922.00.

4. That the Debtor had previously been employed by Payless and she received a buyout in April and May 2006.

5. As a result of the buyout, the Debtor's monthly gross income was $11,990.03 in April and $15,356.42 in May.

6. That these figures were used to complete the Chapter 13 Statement of Current Monthly and Disposable Income and resulted in an annualized current monthly income of $64,124.34.

7. That the Debtor is single with no children and the applicable median family income is $36,631.00.

8. That the Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) indicates that the Debtor has Monthly Disposable Income of $1,114.98.

9. That the Debtor's Schedule J indicates expenses totaling $1,772.97 with excess income of $149.03.

10. That the Debtor's Chapter 13 Plan proposes a $144.00 plan payment for a period of 36 months.

11. That it is evident that Debtor is unable to pay the $1,114.98 payment pursuant to the B22C form.

12. That the buyout numbers should not be used to determine the Debtor's ability to pay because it is not regular monthly income. These figures are simply not representative of Debtor's monthly income.

13. That all creditors have received notice of Debtor's Chapter 13 Plan and there have been no objections to confirmation filed.

14. That the Debtor moves this Court to Determine that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does not Determine Plan Payment.

15. That in the alternative that B22C does apply, Debtor would be forced to voluntarily dismiss and refile a case in order that the buyout not be included in the Debtor's last six months income.

WHEREFORE, the Debtor respectfully requests this Court for an Order allowing Motion to Determine that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) does not Determine Plan Payment.

Respectfully submitted,

s/ Michael F. Brunton

Michael F. Brunton

Jan Hamilton #08163
Chapter 13 Trustee
PO Box 3527
Topeka, Kansas 66601-3527
(785) 234-1551

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
STEPHANIE KAY LANNING	)	Case No. 06-41037-13
Debtor.	)	

CHAPTER 13 TRUSTEE'S RESPONSE TO DEBTOR'S MOTION TO DETERMINE THAT CHAPTER 13 STATEMENT OF CURRENT MONTHLY AND DISPOSABLE INCOME (FORM B22C) DOES NOT DETERMINE PLAN PAYMENT

(Filed Jan. 17, 2007)

COMES NOW, Jan Hamilton, Chapter 13 Trustee, and in response to Debtor's Motion to Determine that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does Not Determine Plan Payment, states as follows:

1. Debtor filed for Chapter 13 relief on October 26, 2006.

2. As set forth in Debtor's motion, Debtor completed Official Form B22C, which indicates a total current monthly income ("CMI") for Debtor of $5,343.70.

3. Debtor is "above-median" with an annualized CMI for 11 U.S.C. 1325(b)(4) of $64,124.34, which is greater than the applicable median family income of $36,631.00.

4. Line 58 of Debtor's Form B22C indicates that the Debtor has monthly disposable income under 1325(b)(2) of $1,114.98.

5. As set forth in Debtor's motion, Debtor's Schedule I indicates monthly net income of $1,922.00, and Debtor's Schedule J indicates monthly expenses totaling $1,772.97, for a monthly excess income of $149.03.

6. Debtor alleges that the B22C income calculation include funds received by the Debtor as the result of a buyout from her former employer, Payless. As a result of the buyout, the Debtor's gross monthly income was inflated to $11,990.03 in April and $15,356.42 in May. The Trustee does not have knowledge of facts to dispute those contentions.

7. In accordance with 11 U.S.C. 1325(b)(1)(B), Debtor's plan may be confirmed over the objection of the Trustee only if the plan provides for all of the debtor's projected disposable income to be received in the applicable commitment period to be paid to unsecured creditors.

8. Under 11 U.S.C. 1325(b)(3), for above-median debtors, the applicable commitment period is "not less than 5 years". Thus, Debtor's "pool" to be paid to unsecured

creditors pursuant to the B22C calculations would be approximately $66,898.80 ($1,114.98 x 60 months).[1]

9. However, in this particular case, Debtor's schedules indicate unsecured debt in the amount of $36,793.36, significantly less than the $66,898.80 that would be paid in under 60 months under the B22C calculation. Thus, consistent with the intent of 11 U.S.C. 1325(b)(1)(B), rather than a monthly payment of $1,114.98, the Trustee proposes that a monthly plan payment of $756.00 is necessary to complete the plan, paying the unsecured creditors in full, within 60 months.

10. Form B22C provides a mechanical test to determine how much of debtor's projected disposable income should be applied to make payments to unsecured creditors under the plan. 11 U.S.C. 1325(b)(1)(B). This is a rigid requirement under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and Debtor is not at liberty to calculate her disposable income based upon consideration of Schedules I and J, simply because it benefits her to do so. Thus, Debtor's monthly payment under the

---

[1] The Trustee uses the term "approximately" here because the Trustee proposes that the Trustee's fees and administrative fees should be deducted from this amount. Thus, the amount actually disbursed to unsecured creditors would be slightly less than the amount indicated by B22C.

plan must be in an amount sufficient to ensure the required payment to unsecured creditors.

WHEREFORE, for the reasons set forth above, the Trustee moves the Court for an Order denying Debtor's Motion to Determine that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does not Determine Plan Payment.

Respectfully submitted,

s/ Jan Hamilton
Jan Hamilton #08163
Chapter 13 Trustee
PO Box 3527
Topeka, KS 66601-3527
(785) 234-1551
(785) 235-0537 Fax
jan.hamilton@topeka13trustee.com

s/ Teresa L. Rhodd
Teresa L. Rhodd #21586
Office of Jan Hamilton,
Chapter 13 Trustee
PO Box 3527
Topeka, KS 66601-3527
(785) 234-1551
(785) 235-0537 Fax
teresa.rhodd@topeka13trustee.com

Jan Hamilton #08163
Chapter 13 Trustee
PO Box 3527
Topeka, Kansas 66601-3527
(785) 234-1551

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	Case No.
STEPHANIE KAY LANNING	)	06-41037-13
Debtor.	)	

CHAPTER 13 TRUSTEE'S OBJECTION TO CONFIRMATION OUT-OF-TIME

(Filed Mar. 15, 2007)

COMES NOW, Jan Hamilton, Chapter 13 Trustee and for his Objection to Confirmation Out-of-Time states to the Court as follows:

The Plan fails to provide that all of the Debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors under the plan as required by 11 U.S.C. 1325.

WHEREFORE, the Trustee prays the court deny confirmation of the Plan and for such other and further relief as the Court may deem just and equitable in the premises.

Respectfully submitted,

s/ Teresa L. Rhodd
JAN HAMILTON #08163,
TERESA L. RHODD #21586
CHAPTER 13 TRUSTEE
PO BOX 3527
TOPEKA, KANSAS 66601-3527
(785) 234-1551
(785) 235-0537 Fax
jan.hamilton@topeka13trustee.com

United States Bankruptcy Court
[LOGO]
for the District of Kansas

SO ORDERED.

SIGNED this 15 day of May, 2007.

/s/ Janice Miller Karlin
JANICE MILLER KARLIN
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

IN RE: **Case No. 06-41037**
STEPHANIE KAY LANNING, **Chapter 13**
Debtor.

JUDGMENT ON DECISION

(Filed May 15, 2007)

On May 15, 2007, the Court entered a Memorandum and Opinion sustaining the objection of the Trustee, Jan Hamilton, Chapter 13 Trustee to confirmation of the Chapter 13 plan proposed by Debtor, Stephanie Kay Lanning. In that Memorandum and Opinion, the Court found that Debtor's plan cannot be confirmed because it proposes a plan length of less than 60 months, when she is an above-median income debtor, in violation of 11 U.S.C. § 1325(b)(4).

IT IS SO ORDERED that the objection to confirmation is sustained.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: STEPHANIE KAY LANNING, Debtor, --- JAN HAMILTON, Chapter 13 Trustee, Appellant, v. STEPHANIE KAY LANNING, Appellee, --- UNITED STATES OF AMERICA; UNITED STATES TRUSTEE, Amici Curiae.	No. 08-3009 (BAP No. KS-07-067)

JUDGMENT

(Filed Nov. 13, 2008)

Before **MURPHY,** Circuit Judge, **BRORBY,** Senior Circuit Judge, and **TYMKOVICH,** Circuit Judge.

This case originated in the Bankruptcy Appellate Panel for the Tenth Circuit and was submitted on the briefs at the discretion of the court. The judgment of that court is affirmed.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC 21 2009
OFFICE OF THE CLERK

No. 08-998

In The
Supreme Court of the United States

JAN HAMILTON,
CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Jan Hamilton, Chapter 13 Trustee. The respondent is Debtor Stephanie Kay Lanning. The United States of America appeared Amicus Curiae in the appellate proceedings below.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 545 F.3d 1269 and is reprinted at Pet. App. 1-32. The Bankruptcy Appellate Panel's ("BAP") opinion is reported at 380 B.R. 17 and is reprinted at Pet. App. 33-53. The Memorandum and Opinion of the Bankruptcy Court is not officially reported, but can be found at 2007 WL 1451999 and is reprinted at Pet. App. 54-82.

JURISDICTION

The judgment of the Court of Appeals was entered November 13, 2008. The Trustee timely filed a petition for writ of certiorari on February 3, 2009, which was granted on November 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101-1532 ("BAPCPA") are reprinted at Pet. App. 83-96. The pre-BAPCPA version of 11 U.S.C. § 1325 is reprinted in the Appendix at App. 1. A black-lined version of 11 U.S.C. § 1325 showing the deletions and additions of BAPCPA is provided at App. 2.

STATEMENT OF THE CASE

BAPCPA brought sweeping revisions to the Bankruptcy Code that drastically altered the manner in which bankruptcy courts determine what Chapter 13 debtors must pay to unsecured creditors. These provisions limit the discretion of bankruptcy courts through formula. The Judicial Conference of the United States created the "Statement of Current Monthly Income and Disposable Income Calculation" (Official Form 22C) to implement this formula.

The Tenth Circuit affirmed the decisions of the BAP and the Bankruptcy Court, which allowed the substitution of judicial discretion for the statutorily prescribed formula, since the debtor's income at the time of filing was significantly lower than that reflected by the formula. This analysis has been coined the "forward-looking" approach. The "mechanical" approach, advocated by the Trustee, follows the established formula.

1. The Chapter 13 formula begins initially with the historical average of the income received by the debtor during the six months prior to the filing of the bankruptcy petition (debtor's "current monthly income"). The formula next determines whether a debtor is "above median income" or "below median income." § 1325(b)(3).[1] This determination compares

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[1] All statutory citations are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as amended by BAPCPA, unless otherwise indicated.

the debtor's "current monthly income" to the median income figures for households of the same size in the specific geographic area in which the debtor resides. These above median and below median classifications are new to the Bankruptcy Code and are treated differently. The major distinction between the two is how the debtor's expenses are calculated.

The below median income debtor is allowed to deduct from her "current monthly income" her actual expenses. For an above median income debtor like Ms. Lanning, expense allowances, most of which are based upon IRS standards, are next deducted through the incorporation of the expense side of the Chapter 7 "means test" calculation. § 1325(b)(2) and (3). This results in the statutorily defined "disposable income" for the debtor.

"Disposable income" is newly defined in BAPCPA. Previously, this was generally determined by reference to Schedules I (income) and J (expenses) (Official Forms 61 and 62 respectively). For an above median income debtor, Form 22C[2] now determines, for the most part, what is to be paid to unsecured creditors. The rationale for the distinction between below median and above median income debtors is that Congress desired that debtors who could afford to do so would be required to pay more to unsecured creditors. By imposing a formula, it prevented above

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[2] "Form 22C" was originally "Form B22C". These forms are nearly identical, and the terms are used interchangeably.

median income debtors from creating expense budgets that left nothing for unsecured creditors.

These new income and expense standards only come into play upon the objection of the Chapter 13 Trustee or an allowed unsecured creditor. Then, a debtor must pay to her unsecured creditors all of her "projected disposable income" "to be received" in the "applicable commitment period" "as of the effective date of the plan." § 1325(b)(1)(B). These phrases are at the center of the controversy before this Court.

Although Congress changed the definition of "disposable income," it left undefined the term "projected disposable income." Likewise, as under the 1978 Code, BAPCPA did not define "effective date of the plan." These terms have always impacted the timing of determination of income, for purposes of establishing what is to be paid to creditors. Since the purpose of the Chapter 13 formula is now to determine what is to be paid to "unsecured creditors," rather than creditors generally, these terms and their definitions have become newly significant.

2. Courts have struggled with the new statutory formula for Chapter 13. Broadly stated, should the statutes be read strictly to control the amount a debtor must pay to unsecured creditors, or should changes in circumstances, evident at the time of filing, be taken into account, even if not expressly permitted by the governing statutes? Courts are divided into roughly two camps: "mechanical" and "forward-looking."

The mechanical courts hold that the formula controls and that "projected" is nothing more than a modifier of "disposable income," as it was under prior law. This group contends that one should "do the math" and project it forward. The results may sometimes be harsh, sometimes not. Regardless, Debtor may soften the result. She may file under or convert to Chapter 7, where the test is different. The filing of the bankruptcy petition may be delayed. Further, there is a statutory option that permits the shifting of the six-month look back period under § 101(10A).

The forward-looking group contends the court may look at changes in circumstances beyond what the formula permits because "projected disposable income" must have a different meaning than "disposable income" to give effect to every word of the statute. This group, including the bankruptcy court here, also suggests that a plain reading of the statute leads to absurd results, thus allowing the court to ignore the statutory formula.

3. Debtor Stephanie Lanning filed her Chapter 13 bankruptcy petition and related documents on October 16, 2006. Per her Form B22C, Ms. Lanning's "current monthly income" was $5,343.70. As a result, her income was determined to be above the median income for a household size of one in the state of Kansas ($36,631.00 annually). As an above median income debtor, Ms. Lanning was required to, and did, complete the remainder of the form, taking allowed statutory and IRS standard deductions. This resulted in "monthly disposable income" of $1,114.96.

At the time of the filing of this case, Debtor Stephanie Lanning's actual income was not accurately reflected by the formula, because she had received a substantial "buy out" from her former employer within the six months prior to the filing of her bankruptcy petition. Consequently, her net Form 22C result dictated that she pay an amount to her unsecured creditors that her actual budget reflected she could not pay.

On Schedule I, Ms. Lanning indicated that her actual monthly income was $1,922.00 per month, which when annualized to $23,064.00 is notably less than the applicable median income. Moreover, after deducting Ms. Lanning's actual expenses as reported on Schedule J, her actual monthly disposable income was only $149.03. The Chapter 13 Plan provided for monthly plan payments of $144.00 for 36 months and to pay unsecured creditors "any funds not necessary to satisfy administrative expenses, secured claims and priority claims within the initial 36 months of this plan." J.A. 93.

In an attempt to resolve this anomaly, Ms. Lanning filed a Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does Not Determine Plan Payment. J.A. 103. By this motion, the debtor reported that the historical income average utilized in Form B22C was artificially inflated due to "buyout" payments that she had received from a previous employer during the six months prior to filing. As a result, her monthly gross income for April of 2006

was $11,990.03 and for May of 2006 was $15,356.42. The parties stipulated that these payments were unlikely to recur in the future. The net effect was that her B22C monthly income was $5,343.70 compared to her actual monthly income on the date of filing of $1,922.00. Debtor contended she should be able to deviate from the B22C result because of this drop in income, while the Trustee contended that once the bankruptcy was filed, the court had no statutorily based authority to act in a manner other than as proscribed.

The Trustee filed a response in opposition to Ms. Lanning's motion and also filed an Objection to Confirmation of Debtor's Chapter 13 Plan. The Trustee asserted that Debtor must pay to her unsecured creditors the net result from B22C. He also contended that her plan must run 60 months, which is the "applicable commitment period" for a debtor with above median income.

4. In its decision entered May 15, 2007, the bankruptcy court sustained the Trustee's objection as to the length of the plan, holding that an above median income case must run 60 months unless unsecured creditors are paid in full.[3] However, the court overruled the remainder of the Trustee's objection and granted the debtor's motion to deviate from the B22C result. The court found that "the net income

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[3] This portion of the ruling was not appealed and is not before this Court.

number obtained from Form B22C is the debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in that form are not commensurate with a fair projection of debtor's income in the future." Pet. App. 56.

The Tenth Circuit found that the Chapter 13 version of the "means test" is a "starting point" for determining what a debtor should pay to her creditors. The Court also found that if there was a "substantial change in circumstances" not reflected in the 22C formula, the Court could refer to Schedules I and J in order to divine what should be paid to unsecured creditors. In so holding, the Court recognized that it was "read[ing] into the statute a presumption" as the phrases "starting point" and "substantial change in circumstances" are nowhere found in the statute. Pet. App. 24.

The bankruptcy court's analysis, affirmed by the Tenth Circuit, also characterizes the result in Ms. Lanning's case as "absurd." This brings into play this Court's decision in *In re Lamie*, although the Tenth Circuit did not expressly address the concept. The Chapter 13 Trustee argued that "absurd" and "harsh" are not the same. *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

5. The Trustee appealed the bankruptcy court's ruling that the statutes at issue are a mere starting place for the discussion and that pre-confirmation changes in income could be taken into account by the

court in determining what should be paid to unsecured creditors. The BAP and Tenth Circuit Court of Appeals affirmed the bankruptcy court's holding. The Trustee contends the lower courts erred in their failure to follow the text of statutes relevant to determining "disposable" and "projected disposable income." This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Tenth Circuit determined that bankruptcy courts may consider changes in debtor's circumstances, present at the time of filing of the bankruptcy, to determine what a Chapter 13 debtor is required to pay to unsecured creditors. This holding is contrary to the plain text of § 1325(b) and is not supported by either the statutory or legislative history of BAPCPA.

Congress perceived that creditors were not receiving fair treatment in bankruptcy. Right or not, Congress believed bankruptcy judges were at least partially responsible for debtors not paying enough money to their unsecured creditors. This eventually resulted in the enactment of BAPCPA. The new law, widely criticized for its lack of clarity, was at least crystal clear in one major regard: Congress intended to divest bankruptcy courts of their broad power to determine what should be paid to creditors. Congress' intent was boldly expressed in the creation of the Chapter 7 "means test," a portion of which was

incorporated into Chapter 13. The purpose was to require debtors to pay as much as they could to their unsecured creditors. Ignored by many courts, the means test is a clear and unequivocal road map for courts to follow. The legislative history indicates, without question, that Congress intended to reduce judicial discretion in this area.

For above median income debtors, Congress added to § 1325(b) a new subparagraph (3) which defines what amounts could be deducted in order to ultimately translate "current monthly income" into "disposable income." Previously, this had been largely discretionary, although general guidance was within the prior statute. Now, "amounts reasonably necessary to be expended . . . *shall* be determined . . . " in accordance with the expense side of the Chapter 7 means test. § 1325(b)(3) (emphasis added). This new provision is particularly important because it specifically directs courts to determine the reasonableness of expenses in accordance with certain IRS guidelines, both in the first instance and in the event the debtor seeks to deviate from the statutory mandate because of "special circumstances." This formula is now represented by Form 22C.

There are two broad schools of thought regarding the question of whether bankruptcy courts may deviate from the Chapter 13 version of the means test. These divergent positions are commonly referred to as "forward-looking," which is the view of the Tenth Circuit, and "mechanical," which is the concept advocated by the Trustee. Even the Tenth Circuit

candidly admitted that both positions are not without problems. The Trustee's view does better service to the statute than the forward-looking approach.

The forward-looking view is well intentioned, but mostly result driven. It consists, in the first place, of varied judicial inventions to avoid the strict language of the statute. Such terms as "presumptively correct," "substantial change in circumstances," and "starting point" are used in the Tenth Circuit opinion. These phrases are not contained, or even suggested, in § 1325(b) or elsewhere. The quarrel this camp has with the new statute is actually with respect to phrases that have been in § 1325(b) since 1984. These are "effective date of the plan," "disposable income," "to be received," and "projected disposable income." These terms had settled meanings under pre-BAPCPA case law. By now challenging the application of these phrases, the forward-looking camp completely ignores the new statutory formula, if debtor's circumstances pre-confirmation differ from the "disposable income" figure obtained by following the new rules.

The bankruptcy court characterized the result in Ms. Lanning's case as "absurd." However, if it is absurd, it is only because Debtor did not avail herself of various options. She could have waited two months to file. She could have used § 101(10A) to have the court select a different six-month look back period that was more representative of her actual income. She could have filed, or converted her case to, a Chapter 7 and argued "special circumstances" on the income side of the means test equation. Finally, she

could have even dismissed and re-filed to obtain a different result. Any statute with monetary or time parameters may, at times, result in harsh, or even what one might call absurd results. This is the nature of limiting statutes.

Courts have generally commented upon the lack of BAPCPA legislative history. However, if one looks at the 2000 version of BAPCPA considered by the 106th Congress, which is identical to the current law with respect to § 1325(b), it is apparent that Congress was clear in its resolve.

> "It is intended that there be a uniform, nationwide standard to determine disposable income used in chapter 13 cases based on means test calculations. . . ."

146 CONG. REC. S11,703 (2000) (Statements of Sen. Grassley).

A text-based interpretation of § 1325(b) cannot and does not support the various result driven judicial inventions, which have developed post BAPCPA. The mechanical approach is true to pre-BAPCPA case law and is in line with the legislative history. It is only the mechanical view that results in the preservation of the Chapter 13 version of the means test, while the forward-looking approach results in the destruction of this formula and the substitution of judicial discretion. The mechanical approach is faithful to the language of the statute and the expressed intent of Congress.

ARGUMENT

I. Congress Intended To Curtail Judicial Discretion In Chapter 13 As Shown By The Statutory And Legislative History Of BAPCPA.

The Tenth Circuit held that the 2005 amendments to the Bankruptcy Code permitted the bankruptcy judge to ignore the Chapter 13 version of the means test, if the income circumstances of the debtor, pre-confirmation, were substantially different than on the date of filing from the required six month look back snapshot. The court's analysis begins with the conclusion that the debtor would be precluded from Chapter 13 relief if the Trustee's mechanical view of § 1325(b) was adopted. This result driven, forward-looking approach ignores the textual mandates and statutory history of the Chapter 13 provisions at issue. The Tenth Circuit's utilization of such phrases as "substantial changes in circumstances" and "starting point" is the product of judicial invention. Those phrases are not found in the applicable statutes. The approach taken by the Tenth Circuit results in the Chapter 13 means test formula being discarded.

The BAP decision, cited with favor by the Tenth Circuit, concluded that that the BAPCPA amendments gave us "no reason to believe that Congress intended to eliminate the bankruptcy court's discretion to deviate from an application of that formula where significant circumstances support doing so." Pet. App. 51. There is no textual or even historical support for this proposition. Reliance upon a negative

inference, when the statute is so specific in this regard, is wrong. Congress said what it meant and meant what it said. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

A. Statutory Overview.

BAPCPA is not Congress' first effort to effect comprehensive changes to bankruptcy law. The 1978 Bankruptcy Reform Act, Pub. L. No. 103-394, 107 Stat. 4106 (the "1978 Code") completely replaced the 1898 Bankruptcy Act. Even prior to 1978, there were notable amendments relative to what we now know as "Chapter 13." In 1933, Congress created XIII (Wage Earner Bankruptcies), which allowed for the payment of all or part of an individual's obligations over an indefinite period of time. Basic concepts of XIII were retained in the 1978 Code with the introduction of Chapter 13.

The 1978 Code contained no provisions governing how courts should determine the amount of money to be paid to creditors. The only statutory guidance provided was what is now § 1325(a)(3). It required the plan to be filed "in good faith." Good faith, however, was not defined by the 1978 Code. This was the focus of most confirmation disputes. Myriad decisions grappling with the application of this statute to individual cases resulted. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983). Predictably, if not by definition, judicial discretion was implicit in every

case, since the concept of good faith is not susceptible to an analytic grid.

1. Chapter 13 Plan Confirmation Standards.

§ 1321 requires a Chapter 13 debtor to file a plan of reorganization. That plan must meet certain standards, which are found in §§ 1325 and 1322.[4]

The starting place to unravel the statutory web underlying the current confirmation process is § 1325(b)(1) and (2). Subsection (b) was introduced through the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356 (1984). This amendment incorporated a new "ability to pay" test, also referred to as the "best effort" test. *In re Jones*, 55 B.R. 462, 465 (Bankr. D. Minn. 1985). The debtor's financial circumstances were largely examined by reference to Schedules I and J. Then, as now, the provisions of § 1325(b) were operative only upon the objection of the Chapter 13 Trustee or an allowed unsecured claimant.

Four key phrases contained in the 1984 amendments to § 1325 remain in BAPCPA and are at issue. These terms are "disposable income," "projected disposable income," "effective date of the plan," and "to be received." Of these terms, only "disposable income"

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[4] Section 1322 is not directly implicated in the dispute currently before this Court.

was defined in the 1984 amendments, but it was redefined in BAPCPA. The other three terms were not defined in the 1984 amendments, nor are they defined in BAPCPA. However, case law, spanning 21 years, addressing those terms is consistent with the mechanical view of BAPCPA. The mechanical view is thus in line with this court's holding that legislation will not be construed to depart dramatically from longstanding bankruptcy practice, absent an affirmative indication from Congress of intent to do so. *Cohen v. de la Cruz*, 23 U.S. 213, 221 (1998).

a. "Disposable Income."

In the 1978 Code, § 1325(b)(2) generally defined "disposable income" as "income received by the debtor and which is not reasonably necessary to be expended for maintenance or for support of the debtor or a dependent of the debtor." There are many bankruptcy cases where the parties litigated, and bankruptcy judges decided, what was "reasonably necessary." *In re Anes,* 195 F.3d 177, 180-81 (3d Cir. 1999). The wide array of divergent opinions in this area likely suggested to Congress that a redefinition of "disposable income" was appropriate.

BAPCPA introduced new definitions of "disposable income" and "reasonably necessary," which contain specific mandates. These definitions incorporate two other bankruptcy statutes, as later explained. § 1325(b)(2) now reads as follows:

> "(2) . . . 'disposable income' means *current monthly income* received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less *amounts reasonably necessary to be expended* . . . "

(emphasis added).

b. "Projected Disposable Income."

Under the 1984 version of § 1325(b)(1), the Court could confirm the plan only if the debtor proved she was committing to her plan all of her "projected disposable income." *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 357 (9th Cir. 1994). The phrase "disposable income" was statutorily defined. In a Chapter 13 case, it meant all income that was not required for the reasonable, necessary living expenses of the debtor and her dependents. *In re McDaniel,* 126 B.R. 782, 784 (Bankr. D. Minn. 1991), *see also In re Jones,* 55 B.R. at 465.

The phrase "projected disposable income" has been in § 1325(b)(1) since 1984, but has never been specifically defined. Section 1325(b)(1) now provides, in relevant part:

> "[I]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve

> the plan unless, as of the effective date of the plan –
>
> * * * (B) the plan provides that all of the debtor's projected disposable income to be received in the *applicable commitment period* beginning on the date that the first payment is due under the plan will be applied to make payments to *unsecured creditors* under the plan."

§ 1325(b)(1)(B) (emphasis added).

The undefined phrases "projected disposable income" and "effective date of the plan" are unchanged from the 1984 version.

c. "Amounts Reasonably Necessary To Be Expended."

With BAPCPA, Congress introduced § 1325(b)(3), which provides a precise definition of "amounts reasonably necessary to be expended." Previously, the phrase was very generally defined. It now provides, "[a]mounts reasonably necessary to be expended ***shall*** be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) if . . . " the debtor is an "above median income debtor." § 1325(b)(3) (emphasis added).

The remaining portion of § 1325(b)(3) defines "above median income" and "below median income" for debtors, by comparing the debtor's income with those of households of the same size and in the same geographic region. § 1325(b)(3)(A)-(C).

Most courts have held that for a below median debtor, a plan need run only 3 years. For an above median debtor, the plan must run 5 years to satisfy the "applicable commitment period" requirement. Pet. App. 77. This distinction is only important here because Stephanie Lanning is an above median income debtor. She is thus required to determine her expenses in accordance with § 707(b)(2) and to pay her "projected disposable income" for 5 years. Pet. App. 75, 79.

The Question Presented, as accepted for review by this Court, refers to both income and expenses. The debtor's expenses were not challenged. However, sense cannot be made of the Question Presented without reference to both the income and expense sides of the equation.

d. The Chapter 7 Means Test As Incorporated Into Chapter 13.

Section 1325(b)(3) incorporates only a portion of the Chapter 7 means test for above median income debtors. Congress was clear. It used the word "shall." As a result, for an above median income debtor the expense side of the "disposable income" equation is not subject to judicial discretion, except as specifically provided in § 707(b).

Under prior law, § 707(b) was designed to permit a court to determine if a Chapter 7 bankruptcy filing was abusive. The BAPCPA version is roughly ten times

as long and is most detailed. Now, § 707(b)(2)(A)(ii)(I)-(V) provides deductions for national and local IRS standards, certain actual expenses for the care of elderly, ill, or disabled household members, school expenses for minor children, and the costs of administration of the Chapter 13 plan. § 707(b) now contains a prescription rather than general guidance.

Subsections (iii) and (iv) provide the formula for deducting payments for secured debts and priority debts. These deductions are incorporated into the means test and, for Chapter 13 purposes, into Form 22C. In the Chapter 7 context, these standards, found in § 707(b)(2)(A) and a portion of § 707(b)(2)(B), permit the rebutting of the "presumption of abuse," if the debtors prove that their actual expenses are higher and constitute "special circumstances." There is no "presumption of abuse" in Chapter 13.

Chapter 13 permits a showing of "special circumstances" on the expense side only. The courts below were wrong in concluding that "projected disposable income" can be rebutted upon a showing of "special circumstances" at the time of confirmation. Congress did not incorporate the means test wholesale into Chapter 13. § 1325(b)(3). Congress eliminated a debtor's ability to claim "special circumstances" on the income side. The logical conclusion to be made here is that income was to be determined, and fixed, in another manner.

e. "Current Monthly Income."

A Chapter 13 debtor's "disposable income" is newly defined in § 1325(b)(1) as, in the first instance, "current monthly income." § 101(10A) defines "current monthly income," which is a new term in the Bankruptcy Code. 11 U.S.C. § 101(10A) provides:

> "The term 'current monthly income' –
>
> (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –
>
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purpose of this title if the debtor does not file the schedule of current income as required by 521(a)(1)(B)(ii) and (other income inclusions and exclusions not pertinent to this discussion.)"

Congress provided two six-month look back period options, for determining "current monthly income." The first is clearly the six months prior to the bankruptcy filing. § 101(10A)(A)(i). The second option is an alternate six-month period, as determined by the court. § 101(10A)(A)(ii). The second

option could have been, but was not chosen by Ms. Lanning. For further discussion of the second option under § 101(10A) *see* Section II(B)(2)(b) infra.

B. Legislative History.

Extensive legislative history of the prior versions of BAPCPA discloses clear congressional intent supporting the Trustee's view of § 1325(b) and related statutes. To date, in this and other cases, the legislative history of BAPCPA has not been well developed, primarily because the inquiry has been directed at the immediate history surrounding its passage in 2005. As a consequence, most courts, including the Tenth Circuit, have given short shrift to the examination of congressional intent. The Tenth Circuit concluded that "[l]egislative materials are of limited assistance in trying to divine the intent of Congress when it defined 'disposable income' rather than 'projected disposable income.'" Pet. App. 28. Other circuit level cases on § 1325(b) note there is "scant legislative history." *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 656 (8th Cir. 2008). The *Petro* court in the Sixth Circuit also examined only the limited legislative history of the current version of BAPCPA. *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369, 376 (6th Cir. BAP 2008). In *Kagenveama*, the Ninth Circuit made a brief foray into the legislative history with reference to the warnings of the Chapter 13 Trustees. *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 875 (9th Cir. 2008). These cases suggest clear legislative history would be

welcome. Examination of the legislative history of the prior attempts to pass bankruptcy reform legislation is appropriate and revealing.

1. Legislative History Is Helpful In Determining Congressional Intent.

The starting point for determining congressional intent is always the existing statutory text. *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432 (1999), *see also Lamie*, 540 U.S. at 527. The Trustee contends that the statute is clear and unambiguous. The inquiry could stop here, as the terms invented by the forward-looking group are simply not found in the text of the statute.

The Tenth Circuit found that the operative statutes were "plain" but "unclear." Pet. App. 14. This conclusion is hopelessly contradictory, since the adjective "plain" means "clear." *Merriam-Webster Online Dictionary*, 12 December 2009, www.merriam-webster.com/dictionary/plain. Through this equivocation, the court was able to find that it was following the plain meaning of the statute, but since it was unclear, it could substitute its own lexicon for the text of the statute. These two notions are obviously inherently mutually exclusive. Although the Trustee contends the mandates are clear and the dispute should be resolved based upon their plain language, surely the terms at issue are not to be labeled unclear or ambiguous simply because the parties do not agree as to their meaning. "A mere disagreement among litigants

over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of America Nat'l Trust and Sav. Ass'n v. 203 North LaSalle*, 526 U.S. 434, 461 (1999) (concurring opinion).

Generally, if the statute's language is plain, it is then the sole function of the courts to enforce it according to its terms, unless the disposition required by doing so is absurd. *Hartford Underwriters v. Union Planters Bank*, 530 U.S. 1 (1942); *Lamie,* 540 U.S. at 534. The results of this statute are not absurd, but may sometimes be harsh. Regardless, the results here are mostly so because of choices made by Debtor and her counsel.

"Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Toibb v. Radloff*, 501 U.S. 157 (1991), *citing Blum v. Stenson,* 465 U.S. 886, 896 (1984). While the Trustee contends the statute is clear, if this Court determines it is not, then certainly the legislative history must come into play. Ultimately, it will be shown that should this analysis be pursued, required or not, the legislative history of this statute is conclusive: Congress intended to drastically reduce judicial discretion of bankruptcy judges.

Additionally, however, this Court has, on many occasions, examined the legislative history of a statute

to confirm an analysis or conclusion. In a non-bankruptcy context, this Court concluded "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, *in the absence of a clearly expressed legislative intent to the contrary*, that language must ordinarily be regarded as conclusive." *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (internal citations omitted) (emphasis added). If this Court should determine that the clear language of the statute supports Debtor, then examination of the legislative history is still appropriate.

Moreover, what the courts below have done constitutes much more than a mere tweaking of the statutes to remedy a perceived omission. The net effect of the Tenth Circuit's forward-looking interpretation is a significant rewrite of the underlying statutes. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978). This Court has also reviewed legislative history when Congress has been silent. *Grogan v. Garner*, 498 U.S. 279 (1991).

2. Legislative History Of Prior Versions Of A Statute, Not Enacted, May Disclose Congressional Intent.

As in *Lamie*, the legislative processes behind the current law may be instructive. "The legislative history of a prior bill that was not enacted can be useful

to interpret language in a bill that was ultimately enacted." *In re Kimbro*, 389 B.R. 518, 525 (6th Cir. BAP 2008), *citing Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980) (additional internal citations omitted). This Court utilized the legislative history and statutory background to confirm an interpretation of the Bankruptcy Code in *Johnson v. Home State Bank*, 501 U.S. 78 (1991). In the present case, the legislative process can best be seen by first tracing the prior attempts to amend the statute through the enactment of BAPCPA.

3. The Overall Legislative History Supports A Mechanical, Plain Reading Of BAPCPA.

The absence of significant specific legislative history of the 2005 legislation has troubled many courts interpreting the BAPCPA version of § 1325(b) and related statutes. Pet. App. 29. BAPCPA came out of the 109th Congress as Pub. L. No. 109-8. The process leading to the passage of this legislation began in 1998. The House of Representatives and the Senate passed several versions of bankruptcy reform over the years. BAPCPA was a culmination of those years of effort. Significant legislative history is available for prior versions of BAPCPA, particularly the 2000 efforts of Congress, at least as it relates to §§ 1325(b) and 707(b), which are identical to the

current version.[5] Review of the legislative history from 2000 reveals that the criticism made of the implementation of the IRS standards, ultimately used in the Chapter 7 means test formula, was considered and rejected. H. Rep. No. 109-31 (109th Cong. 2005).

a. 1998 – The 105th Congress.

The 105th Senate passed S. 1301, which is an early version of BAPCPA. It contained no objective measures of repayment capacity or expense formula. The House version (H. Report No. 3150) provided for the use of IRS standards to measure debtor's ability to repay and to determine reasonableness of expenses. The interim report filed for H.R. 3150 stated that the IRS standards were to be "mandatory," in contrast to the Senate proposal, which relied upon judicial discretion. H. Report No. 105-540 (105th Cong. 1998).

Although the conference agreement passed the House, it did not pass in the Senate. H. Report No. 105-794 (105th Cong. 1998). It did not contain the language currently found in § 1325(b)(3), namely, the description of how to calculate the expense side of the equation for an above median income debtor. The Joint Explanatory Statement noted that the House

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[5] A summary of pre-BAPCPA legislative efforts is contained in John McMickle's article *Living Expenses in Chapter 13: A Fresh Look at Bankruptcy Reform*, XXVII ABI Journal 1, C, 70-71 (Feb. 2008).

and Senate had agreed to use the expense formula, which was in the House legislation for measuring repayment capacity under § 707(b). The legislation did not pass that year.

b. 2000 – The 106th Congress.

The Senate considered H. Report 2415. This bill contained language that is identical to the BAPCPA version of § 1325(b). It also incorporated the IRS expense allowance concept for determining allowed living expenses for above median income debtors. Senator Chuck Grassley (R-Iowa) addressed the Senate when it considered the conference report.

The Senator's detailed description of the § 1325 amendments gives great insight into Congress' intent. It also bolsters the mechanical application of the means test formula in Chapter 13. In his description of H.R. 2415 before the Senate, judicial discretion was obviously to be lifted from the page.

> "HR 2415 is the culmination of these efforts and is intended to both remove unequivocally the bankruptcy court's discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and to restrict as much as possible reliance upon judicial discretion to determine the debtor's ability to pay."

146 CONG. REC. S11,700 (2000) (Statements of Sen. Grassley). He further stated,

> "It is intended that there be a uniform, nationwide standard to determine disposable income used in chapter 13 cases based on means test calculations. . . . This section both requires (1) that all of the debtor's disposable income be applied to pay unsecured creditors, and (2) that for debtors whose current monthly income is in excess of the applicable median income level, their disposable income be determined using basic means test concepts which define current monthly income (101(10A)) and allowable expenses (707(b)(2)(A)(ii), (iii) and (B))."

Id. at S11,703. The Senator also specifically described the bill, section by section. The intent of Congress to adopt the mechanical approach is unmistakable in his description of § 1325:

> "Once net monthly income is determined, it is then multiplied by the applicable commitment period to determine the total amount which the plan must apply over its duration to pay unsecured creditors. If the plan does not apply all of disposable income to pay unsecured creditors, the plan is not confirmable."

Id. The "special circumstances" language of § 707(b) originated with the 2000 version and is found in the conference report. H. Rep. No. 106-970 at 9 (106th Cong. 2000). H.R. 2415 was ultimately pocket-vetoed by President Clinton.

c. 2005 – The 109th Congress.

On April 14, 2005, the House took up S. 256. H. Res. 211 (109th Cong. 2005); H. Rep. No. 109-42 (109th Cong. 2005). Thereafter, the House passed S. 256, which was subsequently signed into law on April 20, 2005. Pub. L. No. 109-8, 119 Stat. 23. The BAPCPA versions of § 1325(b)(3) and § 707(b)(2) are identical to those found in the 2000 version.

When Congress amends the bankruptcy laws, it does not write "on a clean slate." *Emil v. Hanley,* 318 U.S. 515 (1943). "[T]his Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 380 (1988). Without question, a proper review of the legislative history of the prior attempts to pass bankruptcy reform legislation supports Congressional intent to not only remove judicial discretion, but to impose a strict standard for determining what was to be paid to unsecured creditors. This legislative history supports the Trustee's position. It is obvious that Congress did not intend to permit courts to substitute their discretion for that formula, even if the debtor's circumstances, at the time of filing, were different than those suggested by the six-month look back period under § 101(10A).

II. The Tenth Circuit Erred In Adopting The Forward-Looking Approach.

With the enactment of BAPCPA, Congress implemented a mechanical test by which a debtor's "projected disposable income" is to be determined. Judicial discretion has been largely eliminated, by statute, through the incorporation of § 707(b)(2)(A) and (B) into § 1325(b). "The formula remains inflexible and divorced from the debtor's actual circumstances." Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H. Rep. No. 109-31, pt. 1 at 553 (2005).

Notwithstanding the statutorily mandated formula, the Tenth Circuit held that the net result on Form 22C constitutes debtor's "projected disposable income" under § 1325(b)(1)(B) *unless* "there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future." Pet. App. 3-4.[6] The Tenth Circuit's forward-looking approach is textually flawed, not historically or legislatively supported, and is result driven.

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[6] *See also Frederickson*, 545 F.3d 652 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009); *In re Nowlin*, 576 F.3d 258 (5th Cir. 2009); *In re Turner*, 574 F.3d 347 (7th Cir. 2009); *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369 (6th Cir. BAP 2008).

A. The Mechanical View Is Better Supported By The Language Of The Statute Than The Forward-Looking Approach.

Section 1325 provides for an above median income Chapter 13 debtor to pay to her unsecured creditors all of her "projected disposable income" over the term of the plan. § 1325(b)(2) explicitly provides the definition for "disposable income." That definition starts the calculation with the debtor's "current monthly income" – a number based upon the debtor's historical average income as required by § 101(10A). This mathematical computation is not amenable to judicial discretion.

1. Congress Intended "Projected" To Modify The Defined Term "Disposable Income."

Neither BAPCPA nor prior law provided a separate definition for "projected disposable income." Proponents of the forward-looking approach suggest this creates an ambiguity. This ambiguity arises, however, only when the reader *presumes* Congress meant more than simply projecting forward the historical income described in the statute. This presupposition requires the reader to perceive an ambiguity that allows one to ignore the statutory definition of "disposable income."

The more plausible and supportable explanation, however, is that a separate definition was not provided because one was not necessary – that Congress

intended the debtor to begin the "projected disposable income" calculation with her six-month historical income. "Projected disposable income" is not a free-standing concept divorced from the definition of "disposable income." It is simply the debtor's "disposable income" projected forward. *Kagenveama,* 541 F.3d at 873; *see also Musselman v. eCAST Settlement Corp.*, 394 B.R. 801 (E.D.N.C. 2008). Under this interpretation of the statute, no ambiguity arises.

If Congress intended a separate definition for "projected disposable income," it easily could have provided one. However, it chose not to do so. Courts should presume that Congress meant what it said and said what it meant. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) *(plurality opinion), citing Connecticut Nat'l Bank,* 503 U.S. at 253-54. The statute does not instruct the court to abandon expressly defined terms when the result of a strict reading is undesirable. The text of BAPCPA is clear. As this Court held in *Lamie,* it is the duty of the judiciary to enforce the plain meaning of statutory text, rather than "soften the import of Congress' chosen words, even if [the Court] believes the words lead to a harsh outcome." *In re Lamie*, 540 U.S. at 528. Judicial creation of a presumption where one was not legislatively provided, or even necessary, is clearly at odds with this Court's prior rulings.

The Tenth Circuit noted the *Alexander* court's observation that Congress elected to adopt the new definition of "disposable income" in § 1325(b)(2) despite the warnings of the Chapter 13 Trustees. The

Trustees warned that strict use of the Form 22C formula would lead to anomalous results in some cases, namely that above median income debtors might pay less than they would prior to BAPCPA. Pet. App. 20-21, *citing In re Alexander*, 342 B.R. 742, 747 (Bankr. E.D.N.C. 2006). In *Alexander*, the court reasoned that the legislature's lack of response to this concern supports a presumption of legislative awareness and intent regarding the consequences of the language with respect to making debtors pay what they can and preventing abuse. *Alexander*, 342 B.R. at 748. The Tenth Circuit dismissed this history by concluding, "[f]or all anyone knows, Congress may have believed that chapter 13 trustees were mistaken and that section 1325 actually would allow bankruptcy courts to do precisely what chapter 13 trustees thought it would not." Pet. App. 30. This conclusion is based upon pure conjecture. It is just as reasonable, if not more so, to assume that the *Alexander* court was correct, and that Congress was aware its efforts would create anomalous results.

2. Historically, "Projected Disposable Income" Has Been Connected To "Disposable Income."

The major changes to § 1325 under BAPCPA were to the definition of "disposable income" in § 1325(b)(2) and the requirement that debtor's "projected disposable income" now be paid to *unsecured creditors* (rather than to creditors generally) and over the "applicable commitment period" (rather than

three years) in § 1325(b)(1)(B). *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 873 (9th Cir. 2008). *See also* App. 2-5. The distinction between "applicable commitment period" and plan length is important to Chapter 13, although not pertinent to the issues presented to the Court.

Pre-BAPCPA, the term "disposable income" was an essential element of the term "projected disposable income." Then, as now, courts debated whether the amount to be paid to creditors was fixed early in the case or should be a moving target. However, it can be said that under the predecessor statute, the term "projected" was always connected to the term "disposable" and was not given a separate and independent meaning. BAPCPA did not overrule this significant body of law. It is only because of resistance to the profound changes in § 1325(b) that some have sought to now create a new meaning, where previously there was no dispute.

> "For the two decades between 1984 and 2005, upon objection to confirmation by the Chapter 13 trustee or the holder of an allowed unsecured claim, the Chapter 13 debtor had to commit all 'projected disposable income' to payments under the plan for at least three years. Disposable income was determined by deducting from the debtor's actual income expenses 'reasonably necessary' for the maintenance and support of the debtor and dependents of the debtor, including business expenses for a debtor . . . "

Keith M. Lundin, *Chapter 13 3rd Edition,* § 466.1 (2007).

Some courts determined that debtor's "projected disposable income" was a 36-month multiplier of her monthly income, and then assessed how much of that was disposable under the statutory definition. *In re Killough,* 900 F.2d 61, 64 (5th Cir. 1990); *Anderson,* 21 F.3d 355, 357 (9th Cir. 1994); and *Solomon*, 67 F.3d at 1128, 1132 (4th Cir. 1995). ("[R]ather than engaging in hopeless speculation about the future, a court should determine projected disposable income by calculating a debtor's present monthly income and expenditures and extending those amounts over the life of the plan.") (internal citations omitted).

Other courts determined that "projected disposable income" was actual income, over the life of the plan, as opposed to what one might estimate at the time of confirmation.[7] Those courts include the 10th Circuit. *In re Midkiff,* 342 F.3d 1194 (10th Cir. 2003); *see also In re Freeman*, 86 F.3d 478 (6th Cir. 1996); and *Rowley v. Yarnall*, 22 F.3d 190 (8th Cir. 1994).

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[7] In any event, under either theory, the Trustee could always file a motion to modify plan payments under § 1329, post confirmation, to the extent he was not estopped by § 1327 *res judicata* provisions. § 1325 has always contained confirmation standards, while § 1329 has always governed post confirmation modification of plans.

The "projected is actual" courts have now been overruled by the language of BAPCPA.

> "'Disposable income' for purposes of § 1325(b) is no longer based on *actual* income at or near confirmation. Instead, BAPCPA substitutes a new concept, current monthly income (CMI), that is an average of income received by the debtor during the six months before the month of the petition. Chapter 13 debtors are small, volatile economies. CMI mirrors the debtor's financial circumstances during the slide into Chapter 13. CMI is easily manipulated by the timing of the petition. CMI does not change as the debtor's circumstances change from the petition to confirmation and through the years of the Chapter 13 case. These issues disconnect the disposable income test from the reality of individual Chapter 13 debtors and their plans."

Keith M. Lundin, § 466.2-3.

Both of these theories had, at their base, the assumption that "projected disposable income" was "disposable income," either estimated at the time of filing, or actual, which was then projected over the life of the plan. "Before the enactment of BAPCPA, 'projected disposable income' was understood to be the same as 'disposable income' as defined in § 1325(b)(2)." *In re Thomas, et al.*, 395 B.R. 914, 921 (6th Cir. BAP 2008). This Court has held that the Bankruptcy Code shall not be construed to erode past practice, absent a clear indication that Congress so intended. *Cohen*, 23 U.S. at 221. No such intent is

evident with regard to Congress' continued use of the word projected in § 1325(b)(1)(B). Consistency demands that in BAPCPA "projected disposable income" must continue to be read to incorporate the definition of "disposable income" in § 1325(b)(2), as did prior case law.

There was no change, express or implied, to support the proposition that "projected" now has a new meaning under BAPCPA. As noted by the Ninth Circuit, "Any change in how 'projected disposable income' is calculated only reflects the changes dictated by the new 'disposable income calculation'; it does not change the relationship of 'projected disposable income' to 'disposable income.'" *Kagenveama*, 541 F.3d at 873.

Congress is presumed to have been aware of the status of the law. It did not address issues that had been decided by the courts over a 21-year history of the 1984 amendments to the 1978 Code. It has long been held that silence of Congress, despite opportunity to speak, infers legislative approval of the judicial construction. *Missouri v. Ross*, 299 U.S. 72, 75 (1936); *see also Francis v. Southern Pac. Co.*, 333 U.S. 445, 450 (1948).

3. Connecting "Projected Disposable Income" With "Disposable Income" Is Supported By The Text Of § 1129.

The intent of Congress to view "projected disposable income" consistently with the § 1325(b)(2)

definition of "disposable income" is also evident when one looks to § 1129. That section states, in pertinent part, that the court can confirm a plan only when:

> "(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objections to the confirmation of the plan . . .
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor *(as defined in section 1325(b)(2))* to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer."

§ 1129(a)(15)(B) (emphasis added). It is clear that the drafters intended "projected disposable income" to have a definition incorporating "disposable income" as defined in § 1325(b)(2). The courts below have summarily rejected this argument. Pet. App. 27-28, n.7. However, these courts have ignored what § 1129 expressly states – that Congress considered § 1325(b)(2) to *define* "projected disposable income."

4. Forward-Looking Courts Have Erroneously Held The Mechanical Approach Renders The Word "Projected" Superfluous.

Central to the forward-looking argument is that the term "projected disposable income" in § 1325(b)(1)(B) must have a definition apart from that

of "disposable income" in § 1325(b)(2). Otherwise, the term projected is rendered superfluous. However, the majority of courts misapprehend the mechanical approach, which does not ignore the term, but rather assigns to it the same meaning as asserted by forward-looking courts. The term "projected," which is not defined in the statute except by inference in § 1129, "means '[t]o calculate, estimate, or predict (something in the future), based on present data or trends.'" *Nowlin*, 576 F.3d at 263, *citing In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006) (*quoting Am. Heritage College Dictionary* 1115 (4th ed. 2002)). Contrary to the assertions of forward-looking supporters, this definition is not inconsistent with the mechanical approach. Rather, mechanical application of the means test simply provides a uniform method for calculating the "data" or "trends" to be projected into the future. Thus, the mechanical approach is also future oriented in that respect. The courts below and others examining this concept simply are reluctant to give up discretionary powers. Congress intended otherwise.

A cardinal rule of statutory interpretation is to adopt a reading that does not treat statutory terms as mere surplusage. *Williams v. Taylor*, 529 U.S. 362 (2000). The Trustee suggests that it is only the mechanical approach that accomplishes this end. The word "projected" can be given meaning without the judicial creation of a presumption or ignoring the statute altogether. The Ninth Circuit cited this Court's decision in *Negonsott v. Samuels*, 507 U.S. 99,

106 (1993), for the proposition that courts must give meaning to every clause and word of a statute. *Kagenveama*, 541 F.3d at 872.

The *Kagenveama* court reasoned that "projected" is simply a modifier of the defined term "disposable income." In order to give meaning to *every* word of § 1325(b)(1), the debtor's "disposable income" is merely projected out over the applicable commitment period. *Id.* Thus, one just multiplies the debtor's net monthly disposable income by the number of months in the applicable commitment period. *Alexander*, 344 B.R. at 742.[8]

Moreover, if the two terms are not linked, then the definition of "disposable income" in § 1325(b)(2) becomes a "floating definition with no apparent purpose." *Kagenveama*, 541 F.3d at 573, *citing Alexander*, 344 B.R. at 749. Also, § 1325(b)(2) begins "[f]or purposes of this subsection, the term 'disposable income' means. . . ." The only other time the words "disposable income" are used within that subsection is in the phrase "projected disposable income" in § 1325(b)(1)(B). Thus, ignoring the connection between "projected disposable income" and "disposable

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[8] *See also Kagenveama*, 527 F.3d 990 (9th Cir. 2008); *In re Austin*, 372 B.R. 668 (Bankr. D. Vt. 2007); *In re Brady*, 361 B.R. 765 (Bankr. D. N.J. 2007); *In re Hanks*, 362 B.R. 494 (Bankr. D. Utah 2007); *In re Miller* 361 B.R. 224 (Bankr. N.D. Ala. 2007); *In re Girodes*, 350 B.R. 31 (Bankr. M.D.N.C. 2006); *In re Tranmer*, 355 B.R. 234 (Bankr. D. Mont. 2006).

income" also renders the phrase "for purposes of this subsection" superfluous.

5. The Mechanical Approach Gives Effect To The Phrases "To Be Received," "Will Be Applied To Make Payments," And "As Of The Effective Date Of The Plan" Found In § 1325.

The Tenth Circuit acknowledged that both the mechanical approach and the forward-looking approach were not without problems. Pet. App. 23. But, the court dismissed the potential criticism for the liberties it took with the imposition of a presumption by suggesting the mechanical camp ignores the phrases "as of effective date of the plan," "to be received in the applicable commitment period," and "will be applied to make payments." *Id.* In creating the presumption, the court again relied on the principle of statutory construction that a statute, upon the whole, should be so construed so that "no clause, sentence, or word shall be superfluous, void or insignificant." Pet. App. 24, *citing TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). "We think that these textual problems . . . outweigh the concern about implying a presumption." *Id.*

However, these phrases have little impact on the "projected disposable income" discussion. If anything, their impact is neutral. "[T]here is nothing illogical or superfluous in language requiring that, *as of the effective date of the plan*, the plan provide that all of

the resulting mathematical calculation (*i.e.*, projected disposable income) *to be received in the applicable commitment period . . . will be applied* to make payments to unsecured creditors." *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio 2009). Without citing to the congressional record for support, forward-looking courts suggest these phrases reveal congressional intent to look to the debtor's actual income to be received during the life of the plan, rather than the historical average income. *In re Hardacre*, 337 B.R. 718 (Bankr. N.D. Tex. 2006). This interpretation is not supported by the legislative history of § 1325, discussed supra, which unequivocally demonstrates congressional intent to utilize a formulaic approach to determining the amount to be paid to creditors.

Even more emphasis is inappropriately placed upon the meaning of the phrase "effective date of the plan." This argument ignores the realities of Chapter 13. The most common understanding of the meaning of "effective date" is the "date on which the provisions of a plan of reorganization become effective and binding on the parties." Kenneth K. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 Am. Bankr. L.J. 551, 560-61 (1995); *see also In re Potomac Iron Works, Inc.*, 217 B.R. 170 n.1 (Bankr. D. Md. 1997) (listing bankruptcy code sections in which the term "effective date" appears). For purposes of Chapter 13, this date will likely be the date upon which the confirmation order becomes final and non-appealable. Unlike the confirmation process in Chapter 11, a plan may be confirmed very quickly in

Chapter 13. Plans are generally filed with the petition. The debtor must begin making payments within 30 days of the filing of the petition. § 1326(a)(1). The confirmation hearing must now be held between 20 and 45 days after the First Meeting of Creditors, which is held between 20 and 50 days after the filing of the case. §§ 341 and 1324(b), Fed. R. Bankr. P. 2003(a). So, the effective date can be as soon as two months after filing.

Moreover, the Tenth Circuit violated the very rule of construction upon which it relies. It is the forward-looking view that eviscerates § 1325. The Chapter 13 version of the means test is discarded, if the debtor can show her circumstances at confirmation are different than as stated in the 22C formula. The notion that Congress' inclusion of these catch phrases is somehow more supportive of the forward-looking position, thereby allowing it to ignore the statutory proscription, is plainly wrong. The mechanical approach provides just as much meaning, if not more so, to the phrases, and does so without undermining the effect of other statutory provisions. So, even utilizing the Tenth Circuit's own analysis and reasoning, the forward-looking approach does more damage to the statutory framework than does the Trustee's mechanical view.

Only by improperly finding that "projected disposable income" is a separate, but undefined, term can one make even the weakest of arguments that these phrases support this strained reading of the § 1325(b)(1). It makes no sense to define "disposable

income," completely ignore the definition upon a showing of changes in circumstances, and then project income based upon some different, but statutorily undefined standard. This is exactly what Congress sought to avoid. Furthermore, there is no support whatsoever for abandoning the statutory formula entirely, as is suggested by forward-looking view.

In any event, even if this Court determines the mechanical approach renders the word "projected" superfluous, it is not required to adopt the forward-looking approach. In *Lamie*, this Court adopted a reading of the text of § 330 that rendered the word "attorney" in § 327 without effect. "Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute." *Lamie*, 540 U.S. at 536, *citing Chicksaw Nation v. United States*, 534 U.S. 84 (2001) ("[T]he preference is sometimes offset by the canon that permits a court to reject words as surplusage if inadvertently inserted or if repugnant to the rest of the statute"). Here, using the term "projected" as a means to deviate from the statutory formula is unquestionably at odds with the language and legislative intent of BAPCPA.

6. Congress Incorporated § 707(B) Into Chapter 13 Only On The Expense Side Of The "Projected Disposable Income" Equation.

Congress provided for consideration of "special circumstances" on both the income and expense sides

of the equation in Chapter 7 with § 707(b)(2)(B). However, § 1325(b)(3) incorporates this section only as to the determination of allowable expenses. Section 1325(b)(3) provides, for an above median income debtor,

> "(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of 707(b)(2)."

Thus, the consideration of special circumstances provided in § 707 is applicable *only* on the expense side of the projected "disposable income" calculation. Further, the Tenth Circuit, while suggesting the mechanical approach does not permit adjustments to account for "special circumstances" only mentioned, but did not address or discuss the implications of Congress' failure to incorporate the income adjustment formula from § 707(b). To allow judicial consideration of such circumstances with regard to income ignores Congress' desire to limit such discretion.

The portions of the legislative history cited by the Trustee supporting his interpretation are consistent with the statute and are compelling. However, there is one isolated suggestion in the congressional record to the contrary. "As with the means test, adjustments are also permitted to income or expenses based on the 'special circumstances' provisions of the means test." 146 CONG. REC. S11,703 (2000) (Statements of Sen. Grassley). This statement is incorrect, not consistent with the rest of the legislative history, and not supported by the text of § 1325(b)(3).

7. The Forward-Looking Camp's Reliance On Schedule I Is Misplaced.

Some forward-looking courts, including the bankruptcy court, reference Schedule I as support for the majority approach. Pet. App. 69-70. However, there is no statutory support here for this proposition. § 1325 makes no reference to Schedule I or to § 521 (the statutory predicate for Schedule I). Thus, proponents of the forward-looking approach suggest this Court ignore express definitions of "disposable income" and "current monthly income," in favor of artificially connecting Schedule I to § 1325 in an effort to support its cause.

These courts suggest that "projected disposable income" must be a future-oriented concept to give meaning to Schedule I. Pet. App. 69-70. However, this approach ignores the significance of Schedule I apart from any implication in determining the debtor's "projected disposable income." It is not necessary to create a link between Schedule I and "projected disposable income" to give it meaning. There is also a complete lack of authority for such a leap.

Although BAPCPA has stripped Schedule I of its utility in determining the amount a debtor must repay unsecured creditors, the form is still quite important. Schedule I provides a mechanism for trustees and bankruptcy courts to determine if the plan and the petition were filed in good faith, as required by § 1325(a)(3) and (7) respectively. (*See Flygare*, 709 F.2d at 1347, for a discussion of "good faith" factors.)

The Trustee also utilizes Schedule I, in conjunction with Schedule J, to determine if the proposed plan is feasible. § 1325(a)(6). Moreover, the parties consider Schedule I to analyze a plan for possible post confirmation modification. § 521(a)(1)(B)(ii) and § 1329.

B. The "Absurd Results" Standard Is Misapplied By Forward-Looking Courts.

The bankruptcy court reasoned that following the mechanical approach leads to "absurd results." Pet. App. 70-72. *See also Frederickson,* 545 F.3d at 659. However, this finding is not supported by the text of BAPCPA, the legislative and statutory history of the provisions, nor this Court's prior guidance with regard to the absurd results analysis. *Lamie,* 540 U.S. at 534; *see also Kagenveama,* 541 F.3d at 875.

It is true that a mechanical application of the "projected disposable income" formula may effectively deny Ms. Lanning Chapter 13 bankruptcy relief because of decisions she and her counsel made. It is unlikely she could fund a plan that required her to pay the net result of Form 22C to her unsecured creditors. It is from this result that the Tenth Circuit obtains its premise. *Lamie* provides a template for application of the "absurd results" standard, when applicable. Harsh or illogical results are not necessarily absurd.

1. Application Of *Lamie*.

In *Lamie*, debtor's counsel filed an application for his fees to be paid from the Chapter 7 estate pursuant to § 330(a). *Lamie*, 540 U.S. at 526. The 1994 amendments to the Code had deleted the phrase "or to the debtor's attorney" from § 330(a)(1), and the court's below held that § 330(a)(1) no longer authorized compensation to debtor's counsel unless employed by the trustee and approved by the court pursuant to § 327. This Court affirmed, although recognizing that the amended statute was now ungrammatical, with its missing "or," and that the Court's interpretation rendered the term "attorney" in § 330(a)(1)(A) superfluous. *Id.* at 536. In discussing whether the court should adopt a different reading, it stated, "[w]e should prefer the plain meaning since that approach respects the words of Congress." *Id.* The same holds true here.

Harsh results are not uncommon and, at times, are even intended under the law. Limiting statutes will by definition always disadvantage those parties who do not fit within the framework. For example, the eligibility standards of § 109 deny Chapter 13 relief to some debtors. Only an individual with non-contingent, liquidated, unsecured debts of less than $307,675 and secured of less than $922,975 may be a debtor in Chapter 13. § 109(e). Likewise, debtors might not be successful in claiming more favorable exemptions because of the venue requirements of § 522(b)(3). Similarly, a creditor holding a claim secured by a vehicle purchased 911 days prior to filing

may have its claim drastically reduced, whereas a similarly situated creditor with collateral purchased within 910 days of the date of filing will be paid in full. § 1325(a)(9)(*). Some farmers may not qualify for relief under Chapter 12 § 101(18).

Moreover, the results of the mechanical approach are neither consistently harsh nor weighted for or against debtors. In *Kagenveama*, the effect was opposite of that in *Lanning*, where Form 22C provided a more "debtor-friendly" result. It is clear that Congress intended to implement a uniform standard for assessing the debtor's ability to pay. Congress concluded that a debtor's historical income from the six months prior to filing was a "more reliable indicator" of a debtor's ability to pay than taking a snapshot of income and expenses as of the date of filing. *In re Austin*, 372 B.R. 668, 679 (Bankr. D. Vt. 2007). Although the majority of courts have disagreed with that concept, that neither makes it inherently flawed, nor does it give courts license to ignore the statutory mandate.

2. Debtor May Avoid A Harsh Result Of The Chapter 13 "Means Test" Through Various Elections.

If the results of this case are absurd, they are only so because the debtor did not avail herself of any of the options available to her which might have mitigated the results of the means test. These options included delaying the filing of the case, electing the

second option in § 101(10A), filing under or converting to Chapter 7, or even dismissing and re-filing.

a. Delay Of Filing To Select A More Representative Six Months.

The debtor in a voluntary bankruptcy case always has control over the date of the filing of the petition. Certainly, in some cases, delay may be less attractive to the debtor due to an imminent foreclosure sale, vehicle repossession, or garnishment. However, the record provides no evidence to suggest that Ms. Lanning could not have reasonably delayed her bankruptcy filing. Debtor's own Statement of Financial Affairs discloses that there were no pending actions against her. J.A. 33-34. Moreover, her Chapter 13 Plan asserted that she was current on her mortgage payments. J.A. 94. By delaying the bankruptcy filing by approximately two months, Ms. Lanning's "current monthly income" calculation would not have included the "buyout" payments that drastically skewed her six-month average income. It is apparent that delaying the filing in this case was a reasonable option that would have mitigated the harsh results. This Court should note that this option is available to any potential debtor, and thus does not support a finding that a mechanical application of the statutory formula leads to absurd results.

b. Changing The Six-Month Look Back Period – § 101(10A)(A)(ii).

If utilizing a look back period based upon the debtor's income from the six months immediately preceding the bankruptcy filing would cause anomalous or harsh results, § 101(10A)(A)(ii) provides a statutory mechanism to provide the debtor relief. Under that section, the debtor may seek leave from the court to delay the filing of Schedule I pursuant to Fed. R. Bankr. P. 1007(c), and ask that the court assign a different, more representative six-month look back period. *In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009); *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio, 2009). Notably, this option does not permit the court to throw away the formula or to use it as "starting place." It merely permits the court to move the six-month period that starts the "projected disposable income" calculation.

Ms. Lanning did not avail herself of § 101(10A)(A)(ii), as she filed her Schedule I at the time she filed her petition for relief. Nor was this subsection discussed in the opinions of the courts below. The first case of note discussing § 101(10A)(A)(ii) in detail was *In re Shelor*, Slip Copy, 2008 WL 4344894, Case No. 08-80738C-13D (Bankr. M.D.N.C., September 23, 2008). This was long after Ms. Lanning's case was filed, and likewise after submission of the parties' briefs to the Tenth Circuit. The first appearance of this discussion in this case was in the Chapter 13 Trustee's Petition for Certiorari. However, any discussion of Debtor's

options cannot be had without consideration of § 101(10A)(A)(ii).

c. Dismissing And Re-Filing.

If the debtor files a bankruptcy petition, then discovers her historical income is not reflective of her anticipated income, the debtor may always dismiss and re-file. There is no code provision prohibiting this. Although there is authority to the contrary, courts have generally refused to find that dismissal and re-filing for purposes of taking advantage of a different time frame under BAPCPA is abusive. *In re Murphy*, 375 B.R. 919, 923 (Bankr. M.D. Ga. 2007) (Debtor's dismissal of a prior case and re-filing to avoid the special treatment of "910 claims" was not in bad faith). Further, this Court has previously held that all serial filings are not necessarily prohibited. *Johnson*, 501 U.S. at 87.

d. Initially Filing Or Converting To Chapter 7.

In further support of the alleged "absurd results," the Tenth Circuit mistakenly concludes categorically that since Ms. Lanning is an above median income debtor, she would not qualify for Chapter 7 relief. This is not accurate. In a Chapter 7, Ms. Lanning would be afforded the right to plead "special circumstances" on both the income and expense side of the equation. As a result, Chapter 7 may have provided relief that Chapter 13 could not afford her.

Again, Congress did not incorporate all of § 707(b) into § 1325(b)(3), so Ms. Lanning can only plead "special circumstances" on the expense side of the equation in a Chapter 13.

e. Chapter 13 Debtors May Establish "Special Circumstances" On The Expense Side Per § 707(b)(2)(B).

BAPCPA provides yet further relief from harsh results for an aggrieved debtor. "Special circumstances" may be demonstrated in Chapter 13 on the expense side of the means test equation. The standard explained in the statute, by way of example, "such as a serious medical condition . . . to the extent such special circumstances that justify additional expenses . . . for which there is no reasonable alternative." § 707(b)(2)(B)(i). Debtors are required to prove up these circumstances by providing documentation together with a detailed explanation. The changes were also capped at the lesser of 25% of the debtor's nonpriority unsecured claims or $6,000, whichever is greater, or $10,000.[9] Although the court is given some discretion, the circumstances must obviously be of some materiality, for a substantial reason, and must be included with the original bankruptcy filing.

[9] These dollar amounts are adjusted every three years by the Judicial Conference of the United States as required by § 104(b).

Thus, the statute does not inherently create absurd results. Even when the outcome may appear absurd, here, it is only due to choices made by Debtor to ignore statutory and procedural mechanisms available to soften the effect.

3. Chapter 13 Provides Creditor Protections To Prevent Abuse.

The Tenth Circuit endorsed the *Hardacre* analysis, which, in part, suggested that the debtor might manipulate the bankruptcy filing date to take advantage of the six-month look back period. Pet. App. 16-17. This conclusion is disingenuous and ignores reality. The timing of the bankruptcy petition has always been one that a debtor may control, and such is the case under either approach. Moreover, *Hardacre* and the Tenth Circuit ignore the fact that BAPCPA left in place safeguards to prevent abuse and preserve the integrity of the process. *Johnson,* 501 U.S. at 87-88 (describing how the confirmation standards of §§ 1325(a)(3), (4), (5) and (6) each provide protections for creditors).

To meet the good faith requirement for confirmation under § 1325(a)(3), debtor must act in good faith in determining "current monthly income." *Hoff*, 402 B.R. at 686-87. Moreover, creditors and the Chapter 13 Trustee are protected by the ability to challenge the filing (or re-filing) of the case under the new § 1325(a)(7), which requires that the action of the debtors in filing the petition be in good faith. New

language in the "relief from stay" provisions similarly protects creditors upon a debtor's re-filing. §§ 362(c)(3) and (4) now require that if a debtor had a bankruptcy case pending within one year prior to filing which was dismissed, the debtor must first demonstrate that the new filing is in good faith in order to be protected by the stay provisions of § 362.

The above provisions work in concert to protect against debtor abuse of the Chapter 13 process. The argument asserted by forward-looking supporters suggests nothing to detract from these safeguards, nor do they describe how the forward-looking approach provides any greater protections for creditors than does the mechanical approach.

C. The Judicial Creation Of A Rebuttable Presumption Is Not Supported By The Statute.

The courts below held that the 22C formula was presumed to be the debtor's "projected disposable income" and was the "starting point" for discussion subject to a showing of substantial change in circumstances. Pet. App. 31-32. However, the concepts of a "rebuttable presumption," "starting point," or "changes in circumstances," substantial or otherwise, are pure judicial invention. The Tenth Circuit reads into the statute a presumption that was not provided for. It does so in direct contradiction of the statutory mandates and without support from the legislative history. *Mobil Oil Corp.*, 436 U.S. at 625.

Moreover, Congress knows how to create a presumption when it desires to do so. It did precisely that with BAPCPA in § 707(b)(2)(A)(i). That section provides:

> "In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court *shall presume* abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of – (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater, or (II) $10,000."

§ 707(b)(2)(A)(i) (emphasis added).

Congressional intent to create a presumption in § 707(b) is textually undeniable – "the court shall presume." Yet, Congress chose not to insert such language when referencing "projected disposable income" in § 1325(b)(2). The phrase "shall presume" does not appear in § 1325. It has long been held by this Court that when Congress has included language in one part of the statute, yet excluded it from another, it did so purposely. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 439-40 (2002). Thus, the only conclusion to be made here is that Congress purposely chose not to create the rebuttable presumption in § 1325 touted by forward-looking courts.

CONCLUSION

The Tenth Circuit should be reversed. This Court should find that Congress said what it meant and meant what it said. While the specific result in this case may be distasteful, limiting statutes, by their nature, occasionally create unpalatable results. The text of the statutes at issue here do not permit bankruptcy judges to countermand the specific formula for determining "disposable income" and hence, "projected disposable income." Likewise, this Court should conclude, in answering the Question Presented, that for above median income debtors, bankruptcy courts may deviate from the means test result only on the expense side in conformity with the procedures and guidance established by Congress. The text of the statutes and the legislative history of BAPCPA demonstrate conclusively that Congress intended to drastically limit judicial discretion, and did so. This Court's decision must give effect to that demonstrated intent.

Respectfully submitted,

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11 U.S.C. § 1325 (2004)
Prior to the Enactment of BAPCPA

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan

on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan – the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(A) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income

of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Black-lined Version of 11 U.S.C. 1325 With Changes Introduced By BAPCPA*

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if(*) –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

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* Additions to the statutory text are indicated with underlining, and deletions are marked by strikethrough.

(*) Section 1228(b) of the Act – Chapter 11 and Chapter 13 Cases. – The court shall not confirm a plan of reorganization in the case of an individual under chapter 11 or 13 of title 11, United States Code, unless requested tax documents have been filed with the court.

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)~~(i) the plan provides that the holder of such claim retain the lien securing such claim; and~~

(i) the plan provides that –

(I) the holder of such claim retain the lien securing such claim until the earlier of –

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the

plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if –

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder; ~~and~~

(6) the debtor will be able to make all payments under the plan and to comply with the plan.;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation,and that first become payable after the date of the filing of the petition if the debtor is

required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308. For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day(**) preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the ~~three-year~~ applicable commitment period beginning on the date that the first payment is due under the

---

(**) So in original. Probably omitted "period".

plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income ~~which is~~ received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts ~~and which is not~~ reasonably necessary to be expended –

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for ~~including~~ charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as ~~that term is~~ defined in section 548(d)(4)) in an amount not to exceed 15 percent of ~~the~~ gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section

707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals,the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than –

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest

median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

RESPONDENT'S BRIEF

No. 08-998

IN THE

Supreme Court of the United States

JAN HAMILTON,
CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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QUESTION PRESENTED

In calculating a chapter 13 debtor's "projected disposable income," 11 U.S.C. § 1325(b)(1)(B), may the bankruptcy court account for the fact that the debtor's income or expenses during the plan period will vary substantially from those during the pre-filing period?

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IN THE

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JAN HAMILTON,
CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Under chapter 13 of the Bankruptcy Code, the debtor's "projected" disposable income is allocated to repay her creditors under the terms of a court-confirmed plan. Respondent is a chapter 13 debtor. Shortly before declaring bankruptcy, she received a buyout payment from her employer that temporarily inflated her income by a significant amount. Because it was clear that respondent's income would be lower during the commitment period of her payment plan, the bankruptcy court held that respondent's "projected" disposable income was properly based on her actual expected income. The bankruptcy appellate panel and court of appeals affirmed.

I. BACKGROUND OF SECTION 1325(B) OF THE BANKRUPTCY CODE

1. Federal law recognizes two principal forms of individual bankruptcy. Chapter 7 provides for the liquidation of the debtor's non-exempt assets to pay creditors. 11 U.S.C. § 701 *et seq.*[1] By contrast, chapter 13 – frequently referred to as "wage earner" bankruptcy – permits a qualifying debtor to retain her assets and pay creditors, usually from ongoing income, generally over three or five years pursuant to the payment schedule established by the debtor's confirmed plan. § 1301 *et seq.*

A chapter 13 debtor must have regular income, § 109(e), have debts below a statutory ceiling, *id.*, and agree to a plan under which her unsecured creditors will receive as much as they would in a chapter 7 liquidation, § 1325(a)(4). The debtor's repayment obligations are specified in her confirmed plan. § 1325(b). After confirmation, the debtor, the trustee, or creditors may ask the bankruptcy court to modify the payments required by the plan. § 1329(a).

The hallmark of a confirmable chapter 13 plan is the statute's categorical feasibility requirement: the debtor must "be able to make all payments under the plan and comply with the plan." § 1325(a)(6).

---

[1] Although most individuals file for bankruptcy under either chapter 7 or chapter 13, individual debtors may also file under chapter 11. 11 U.S.C. § 1101 *et seq.* In this brief, all statutory citations are to the current version of 11 U.S.C. unless otherwise indicated.

2. Congress has over time modified the measure of the debtor's repayment obligation under Section 1325 of chapter 13. Prior to 1984, Section 1325 vaguely provided that the debtor must propose a repayment plan in "good faith." 11 U.S.C. § 1325(a)(3) (Supp. IV 1980). That year, Congress introduced additional standards, including the right of the bankruptcy trustee and unsecured creditors to insist "that all of the debtor's *projected disposable income* to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356 (codified at 11 U.S.C. § 1325(b)(1)(A) (2000)) (emphasis added). Congress also specified that the debtor's projected disposable income would be determined "as of the effective date of the plan." § 1325(b)(1) (2000).

Although the 1984 version of Section 1325 did not define "projected," that term did not give rise to significant controversy. When a debtor's past income and expenses were expected to continue into the future, the court mechanically multiplied her disposable income by the life of the confirmation plan. *E.g.*, *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 357 (9th Cir. 1994). By contrast, when the debtor's future disposable income was going to vary significantly from the past, courts stated that those changes were to be incorporated into a debtor's "projected" disposable income. *E.g.*, *In re Richardson*, 283 B.R. 783, 799 (Bankr. D. Kan. 2002).

The 1984 version of Section 1325 defined the term "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended" for the maintenance and support of the debtor and dependents or for the operation of the debtor's business. 11 U.S.C. § 1325(b)(2) (2000). This itself was somewhat vague, however, because it left the terms "income" and "reasonably necessary" undefined, an omission that gave rise to significant disagreement. It was thus well recognized that "[w]ith regard to the reasonableness and necessity of particular expenses, there [wa]s an abundance of often conflicting case law," 1 John B. Butler, *The Bankruptcy Handbook* 12-143 (2004), and that the statute similarly "need[ed] a comprehensive definition of 'income' for purposes of the disposable income test in § 1325(b)," 2 Keith M. Lundin, *Chapter 13 Bankruptcy* 5-96 (2d ed. 1994).

The 1984 version of Section 1325 also did not specify a time period over which to determine the debtor's average income and reasonably necessary expenses. The official form promulgated by the Judicial Conference for reporting income (known as "Schedule I") called for the debtor to specify her "*current* monthly gross wages, salary, and commissions." *See* Commerce Clearing House, Inc., *Individual Bankruptcy: Your Rights, Responsibilities and Benefits* 88 (1992) (reproducing June 1990 version of Schedule I) (emphasis added); John Ventura, *The Bankruptcy Kit* 161 (3d ed. 2004) (Dec. 2003 version) (same). But that provided relatively little guidance. A leading handbook directed debtors who used a worksheet to calculate their monthly

income and expenses to "enter the amount you receive each pay period. If you don't receive the same amount each pay period, average the last 12," Robin Leonard, *Chapter 13 Bankruptcy: Repay Your Debts* 4/2 (6th ed. 2003); *id.* at 6/40, which for the ordinary wage-earning debtor (who is paid bi-weekly) is roughly the previous six months. *See, e.g., Cadle Co. v. Leffingwell (In re Leffingwell)*, 279 B.R. 328, 342–43 (Bankr. M.D. Fla. 2002) (applying six-month average). But the practices of different judges in particular cases varied. *E.g., In re Weiss*, 251 B.R. 453, 461–62 (Bankr. E.D. Pa. 2000) (considering average over four-year period).

3. In 2005, Congress further amended Section 1325 in the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. Congress left the provision's essential structure intact. It did not define "projected." It also left in place the requirements that projected disposable income be determined "as of the effective date of the plan," that the plan commit all of the "debtor's projected disposable income to be received" over the course of the plan, and that this income "be applied to make payments . . . under the plan." § 1325(b)(1). Likewise, Congress left in place the feasibility requirement of Section 1325(a)(6).

But Congress addressed the ambiguities relating to the term "disposable income," which it redefined. Congress replaced the term "income" in that definition with the phrase "current monthly income," § 1325(b), which it in turn defined as the debtor's "average monthly income from all sources that the debtor receives . . . during the [prior] 6-month

period," § 101(10A). Other provisions excluded certain categories from the definition of income. §§ 101(10A)(B), 1325(b)(2). For example, by excluding Social Security payments, the statute resolved the prior conflict over whether those payments constituted income for the purposes of Section 1325. *Compare In re Hagel*, 184 B.R. 793 (B.A.P. 9th Cir. 1995) (income), *with In re Brady*, 86 B.R. 616 (W.D. Mo. 1987) (not income).

Congress further provided that reasonably necessary expenses of so-called "above-median debtors" would generally be determined under standard schedules. § 1325(b)(3). For example, by limiting the recognition of tuition payments for those debtors to "$1,650 per year per child," § 707(b)(2)(A)(ii)(IV), the statute resolved the prior "split of authority . . . as to whether payment of school tuition is a reasonably necessary expense for a Chapter 13 debtor," *In re Burgos*, 248 B.R. 446, 450 (Bankr. M.D. Fla. 2000).

II. PROCEDURAL HISTORY OF THIS CASE

1. In October 2006, respondent Stephanie Lanning filed for chapter 13 bankruptcy to address approximately $37,000 in unsecured debt that she was unable to repay. J.A. 1. During the six-month look-back period that determined her "current monthly income," and in turn her "disposable income," *see* § 1325(b)(2), Lanning had held three different jobs. In April and May, Lanning was employed at Payless ShoeSource, at an annual salary of approximately $50,000. Her income then dropped dramatically to an annual average of less than

$10,000 as she held only a low-paying, part-time job at JoAnn's Fabric until late August. She was then promoted, and her income rose, although only to roughly $32,000 a year.

Although Lanning's salary income dropped significantly during that period, her average monthly income was greatly inflated by an extraordinary, non-recurring payment. When her job at Payless ended, she received a buyout, paid in two parts (in April and May), of at least $10,000.

Lanning's "current monthly income," § 101(10A) – the monthly average of all her income, including both her salary and the buyout, *ibid.* – was $5344. J.A. 83. Her "reasonably necessary" expenses, § 1325(b)(3) (incorporating § 707(b)(2)) – determined principally under an IRS schedule, because her "current monthly income" qualified her as an above-median debtor – totaled $4229. J.A. 83. Her "disposable income," § 1325(b)(2) – the net of those two figures – was accordingly $1115 per month.[2]

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[2] Lanning's statutorily defined "reasonably necessary" expenses (set forth on her Form 22C, *see* J.A. 77, 79–84) were dramatically higher than her actual expenses (stated on her Schedule J, *see* J.A. 66, 66–68) for two principal reasons. First, Form 22C at the time recognized greater expenses for debtors with higher income. *See* U.S. Trustee Program, *IRS National Standards for Allowable Living Expenses: Cases Filed Between October 1, 2006, and January 31, 2007, Inclusive, available at* www.justice.gov/ust/eo/bapcpa/20061001/bci_data/national_expense_standards.htm. That is no longer true; the current standards grant the same expense allocations regardless of the household's income. *See* U.S. Trustee Program, *IRS National*

2. In determining how to "project[]" the "disposable income" that Lanning would "receive[] in the applicable commitment period," § 1325(b)(1), the bankruptcy court faced a choice between the so-called "mechanical" and "forward looking" approaches to interpreting Section 1325(b). Under the mechanical approach, the court's only role in every case, whatever the circumstances, is to multiply the debtor's statutorily defined "disposable income" (here, $1115) by the number of months in the plan (here, sixty). *See, e.g.*, *In re Vidal*, 418 B.R. 135 (Bankr. M.D. Pa. 2009); *In re Byrn*, 410 B.R. 642 (Bankr. D. Mont. 2008). By that measure, Lanning's projected disposable income would be $66,900 over five years.[3]

Standards for Allowable Living Expenses: Cases Filed On and After November 1, 2009, *available at* http://www.justice.gov/ust/eo/bapcpa/20091101/bci_data/national_expense_standards.htm. Se-cond, Form 22C (unlike Schedule J) defines taxes and payroll deductions as expenses. *Compare* J.A. 65 *with* J.A 81.

Lanning's Form 22C also apparently contains two immaterial errors relating to her expenses. First, it mistakenly relies on payment schedules applicable in October 2005 rather than October 2006. *See* U.S. Trustee Program, *IRS National Standards for Allowable Living Expenses: Cases Filed Between October 17, 2005, and February 12, 2006, Inclusive*, *available at* http://www.justice.gov/ust/eo/bapcpa/20051017/bci_data/national_expense_standards.htm. Second, it miscalculates her "Total Expenses Allowed" in Line 38. J.A. 81.

[3] Lanning did not appeal the bankruptcy court's determination that she was subject to the sixty-month commitment period applicable to an "above-median debtor," § 1325(b)(4)(A)(ii), J.A. 107, 112–13, and that issue is not before this Court.

Because Lanning's repayment obligations under the plan would be capped at her debt of approximately $37,000, she would be required under the mechanical approach to pay that total amount in monthly installments of $756 over the course of the sixty-month commitment period. J.A. 108. But because Lanning could not "make" those "payments under the plan" as required by chapter 13's feasibility requirement, § 1325(a)(6) – given that she would not actually have nearly that much disposable income available to make payments – the application of that approach would render her unable to confirm a plan and consequently ineligible for chapter 13 relief. *Accord* Pet. for Cert. 22 (trustee's acknowledgment that Lanning would be ineligible).

Agreeing instead with the great weight of authority, the bankruptcy court adopted the "forward-looking approach," under which a court faced with a debtor whose six-month look-back period is known to be materially unrepresentative of the debtor's future disposable income – whether higher or lower – considers the debtor's actual expected income and expenses. Pet. App. 54–82. The bankruptcy court understood the term "projected" to be "a forward-looking concept," which "not only allows, but requires," a court to account for "anticipated changes." *Id.* 69. The court thus held that a debtor's "projected" disposable income should be computed by multiplying the debtor's "disposable income" by the number of months in the plan, *unless* "the debtor can show that there has been a substantial change in circumstances." *Id.* 56.

In this case, it is undisputed that the six-month look-back period that governs the determination of Lanning's "current monthly income," §1325(b)(2), is not representative of her future income because of the significant, non-recurring buyout she received from Payless. *See supra* at 7. As of the date of her bankruptcy, Lanning's actual salary was only roughly $32,000 a year – $2700 a month, J.A. 64 – and the bankruptcy court recognized that she would therefore have only $144 per month available to pay creditors. Pet. App. 57; *see also supra* at 7-8 n.2 (explaining the disparity in the calculation of Lanning's expenses). Applying the forward-looking approach, the bankruptcy court approved a confirmation plan requiring Lanning to pay her creditors that amount each month for sixty months. Pet. App. 80.

3. The trustee appealed to the bankruptcy appellate panel, which affirmed. Pet. App. 33–53. The court recognized that under the pre-BAPCPA version of Section 1325 – which had also used the debtor's "projected" disposable income to determine her repayment obligation – courts had not in every case relied "solely on a mathematical formula," but had instead accounted for known changes in income and expenses that were presented by specific cases. *Id.* 51. Because BAPCPA modified the term "disposable income" without purporting to change the meaning of "projected," the court reasoned that the statute did not alter that settled practice. *Ibid.*

4. The trustee appealed once again, and the Tenth Circuit affirmed. Pet. App. 1–32. The court of appeals concluded that only the forward-looking approach is consistent with the text of Section

1325(b), which requires that "as of the effective date of the plan," "projected disposable income to be received" "will be applied to make payments." *Id.* 24. The mechanical approach advocated by the trustee would fix the debtor's projected disposable income without regard to its computation on the plan's effective date; would rely on a determination of income that actually would not "be received"; and would call for "payments" that the debtor could never actually make. *Id.* 25–27.

5. The trustee sought certiorari. This Court invited the Solicitor General to file a brief expressing the views of the United States. 129 S. Ct. 2820 (2009). The government recommended that the Court grant review and affirm. The Solicitor General reasoned that although BAPCPA changed the definition of "disposable income," its failure to modify the settled interpretation of "projected" indicated Congress's determination to allow courts to continue to make judgments based upon facts known or reasonably certain at the time of confirmation. Cert. Br. of U.S. 15–16. The government also noted that the mechanical interpretation would deny bankruptcy protection to "those whose financial situations may be most desperate," a result not intended by Congress. *Id.* 19.

6. While the case was pending on appeal, respondent received a financial settlement from a subsequent employer. Pursuant to the power to modify the terms of the plan post-confirmation, respondent was required not only to continue her payments under the plan, but also to apply $10,000 of the settlement to pay her creditors. *See* App., *infra*.

SUMMARY OF THE ARGUMENT

The lower courts properly calculated Lanning's "projected" disposable income. It is common ground that the term "projected" means "[t]o calculate, estimate, or predict (something in the future), based on present data and trends." *American Heritage College Dictionary* 1115 (4th ed. 2002). Some projections – for example, how many times a coin toss will produce "heads" – require simple multiplication. But others – such as the rate of inflation or unemployment – account for circumstances that will change in the future. A debtor's "projected" disposable income falls into the latter category: it most naturally is understood as taking into account substantial differences that the bankruptcy court determines will arise in the debtor's future income and expenses. Here, it makes no sense to determine Lanning's "projected" disposable income without accounting for the fact that the non-recurring buyout she received from Payless ShoeSource had temporarily inflated her income by a substantial amount.

Furthermore, statutes must be read as a whole, and the remainder of chapter 13, including other language in Section 1325(b) itself, confirms that the lower courts properly applied the "forward-looking approach." Perhaps most important, in conflict with the statutory mandate that courts confirm only feasible plans, *see* § 1325(a)(6), the mechanical approach in many cases (including this one) calls for a payment schedule with which the debtor cannot comply. Relatedly, the statute specifies that projected disposable income will "be received" during

the debtor's "commitment period," § 1325(b)(1)(B), but the mechanical approach regularly attributes to the debtor income that she will never receive.

The mechanical approach is no more supportable with respect to cases in which the debtor's income increases (for example, as a result of a new job) just prior to confirmation. In that circumstance, mere multiplication of the average "disposable income" received by the debtor over the prior six months may produce a confirmed plan that significantly understates her ability to repay her creditors. That result would be directly contrary to Congress's determination "to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005).

The trustee fails to articulate a coherent understanding of how Congress intended the statute to function. Instead, he advocates that debtors use at least four statutory provisions to attempt to evade the illogical consequences of the mechanical approach. That argument is at bottom a concession that Congress did *not* intend for the debtor's projected disposable income to be determined by a mechanical extrapolation from the prior six months' experience. The same conclusion follows from Section 1329, under which bankruptcy courts regularly modify payment plans in light of post-confirmation events. There is no reason to attribute to Congress the illogical conclusion that courts should account for a change in a debtor's income or expenses that occurs the day after confirmation but are categorically forbidden from doing so if by coincidence

the same change happens to occur just the day before.

Settled practice confirms that Congress intended bankruptcy courts to apply the forward-looking approach. Prior to BAPCPA, courts consistently interpreted the term "projected" in Section 1325 to require consideration of changed circumstances. In BAPCPA, Congress left the term "projected" undefined and did not otherwise alter the basic structure of the statute. This case is accordingly controlled by the principle that this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990).

The trustee's contrary arguments are not persuasive. Although Congress did intend BAPCPA's amendment of Section 1325(b) to limit bankruptcy courts' discretion, that statutory change was unrelated to the question presented by this case. Congress resolved the prior disagreement among the federal courts over how to treat certain categories of income and expenses. BAPCPA also specified that the debtor's "*current*" income should be determined on the basis of a six-month average. Both of those changes involved revisions to the definition of "disposable income." But as noted, Congress tellingly did not overturn the forward-looking approach that the bankruptcy courts had consistently applied in determining the debtor's "*projected*" disposable income.

ARGUMENT

Upon objection by the trustee or an unsecured creditor, the bankruptcy court must determine whether a chapter 13 debtor's proposed plan will commit her projected disposable income during the plan period to repay her creditors. § 1325(b). The debtor's "projected" disposable income is her "disposable income" multiplied by the number of months in the commitment period, except in the unusual case in which known or virtually certain differences in the debtor's income and/or expenses will cause a substantial difference in her disposable income during the commitment period. That determination is constrained by the categories of income and expenses Congress identified as relevant to determine a debtor's "disposable income." *Ibid.* *See In re Nowlin*, 576 F.3d 258, 266 (5th Cir. 2009); 5 *Collier on Bankruptcy* ¶ 1325.08 (15th ed. rev. 1996); *accord In re Schyma*, 68 B.R. 52 (Bankr. D. Minn. 1985) (refusing to account for *de minimis* changes). In this case, because the trustee concedes that chapter 13's feasibility requirement would *forbid* the bankruptcy court from confirming a plan that failed to account for the fact that the non-recurring buyout Lanning received from Payless substantially inflated her "current monthly income," the lower courts properly calculated her "projected" disposable income.

I. ONLY THE FORWARD-LOOKING APPROACH CAN BE RECONCILED WITH THE TEXT, STRUCTURE, AND PURPOSE OF THE GOVERNING PROVISIONS OF THE BANKRUPTCY CODE.

A. Respondent's Construction Properly Determines The Debtor's Disposable Income That Is "Projected . . . To Be Received In The Applicable Commitment Period" As It Exists "As of the Effective Date Of The Plan."

1. Under Section 1325, a debtor's obligation to repay her creditors is measured by her "projected" disposable income, which is "to be received in the applicable commitment period." § 1325(b)(1)(B). The statute does not define "projected." The ordinary meaning of that term, with which the trustee agrees, Pet. Br. 40, is "[t]o calculate, estimate, or predict (something in the future), based on present data or trends." *American Heritage College Dictionary* 1115 (4th ed. 2002) (quoted in *In re Nowlin*, 576 F.3d 258, 263 (5th Cir. 2009)). *See also* Cert. Br. of U.S. 9–10 (citing *The New Oxford American Dictionary* 1355 (2d ed. 2005) ("[to] estimate or forecast (something) on the basis of present trends"); *Merriam-Webster Collegiate Dictionary* 993 (11th ed. 2005) ("to plan, figure, or estimate for the future")); *Oxford English Dictionary Online* (rev. 2009), www.oed.com ("predicted; calculated or forecast on the basis of current trends or data").[4]

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[4] *Amicus* National Association of Consumer Bankruptcy Attorneys would define "projected" as "thrown or as if thrown or

The appropriate means to "project" a given measure into the future will vary with the context. Certain circumstances may require mere arithmetic. Take, for example, coin flips. The best "projection" of how many flips will produce "heads" is entirely mechanical – fifty percent – no matter whether the projection is 100, 1000, or 100,000 flips into the future.

But not everything is a coin toss. Projections of subjects that are less uniformly static must account for known changed circumstances. Take a projection of inflation, which would likely start from the premise that recent rates – say, the average over the previous six months – would continue into the future. But the projection would also account for inputs such as governmental policy – for example, a new, expansionary policy by the Federal Reserve that would add money to the economy and cause the rate of inflation to rise.

Another example is unemployment. If the U.S. economy lost 60,000 jobs over the previous six months, an accurate computation of "projected job losses" would not merely mechanically extrapolate from those losses to a total of 600,000 job losses over the following sixty months. Instead, the projection

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cast forward." NACBA Br. 18. But that use of the term relates to physical objects, resulting in a "projectile." The *Oxford English Dictionary* thus includes "to throw, cast, or shoot forwards" in its category of definitions of "project" that "relat[e] to physical operations." *Oxford English Dictionary Online* (rev. 2009), www.oed.com.

would account for foreseen changes in economic growth, government policies, and other factors such as seasonal unemployment. *See, e.g.*, Bureau of Labor Statistics, *The U.S. Economy to 2018: From Recession to Recovery*, *available at* http://www.bls.gov/opub/mlr/2009/11/art2full.pdf (projecting GDP, unemployment, and deficits by accounting for anticipated events such as the end of the war in Iraq and future growth in health care costs).[5]

So too with the determination of a debtor's "projected" disposable income. The "present *data*," *American Heritage College Dictionary*, at 1115 (emphasis added), that underlies the projection is not only the computation of her "disposable income," § 1325(b), but also other known information that may collectively demonstrate that her recent income and expenses will not continue mechanically into the future. A bankruptcy court thus cannot accurately "estimate" or "predict" a debtor's disposable income during the commitment period, *ibid.*, if it deems

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[5] *See also, e.g.*, Office of Management and Budget, *Mid-Session Review, Budget of the U.S. Government* 6, 21, *available at* http://www.whitehouse.gov/omb/assets/fy2010_msr/10msr.pdf ("[T]he deficit for 2010 and beyond is projected to be higher than projected in May largely because of the revised economic forecast"; "projected" 2010-2019 Medicaid expenditures are higher in light of "faster growth in wages and hospital prices."); Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2009 to 2019* 1, *available at* www.cbo.gov/ftpdocs/99xx/doc9957/01-07-Outlook.pdf ("CBO projects that the deficit this year will total $1.2 trillion, or 8.3 percent of GDP. Enactment of an economic stimulus package would add to that deficit.")

changed circumstances irrelevant as a matter of law. As the Collier treatise explains: "A projection for the future would seem to be something that could be quite different than an average of monthly income in the past. To the extent that courts give any meaning to the word 'projected,' and courts are supposed to give meaning to every word in a statute, they may have to disregard the debtor's prior income if circumstances have changed." 8 *Collier on Bankruptcy* ¶ 1325.08 (15th ed. rev. 2009).

This case is a perfect illustration. It blinks reality to say that Lanning's disposable income could properly be "projected" merely by multiplying her average disposable income over the prior six months. The non-recurring buyout she received from Payless ShoeSource had dramatically inflated her recent income. Conversely, the job that she held as of the date of confirmation provided her with greater salary income than she had averaged over the prior six months. When the bankruptcy court accounted for both of those material differences, it recognized that in reality her "projected" disposable income was merely $144 per month, roughly one-eighth the $1115 amount that was produced by applying the "mechanical" approach preferred by the trustee. Pet. App. 57.

At bottom, the trustee reads the word "projected" out of Section 1325. If Congress had intended to adopt the "mechanical approach" it more naturally would have provided, for example, that "throughout the confirmation period the debtor will pay creditors her disposable income." The provision has no need for the word "projected" under the trustee's approach.

Alternatively, Congress would have used a different term – "multiplied" – to require such an exclusively mathematical extrapolation from a specified figure. It did so both prior to and in BAPCPA. For example, in this very case, the bankruptcy court deemed Lanning to be an above-median debtor because the current monthly income of her household "multiplied by 12" exceeded a specified amount. §§ 1325(b)(3), 1325(b)(4). If Congress in Section 1325 had intended to require in every case nothing more than a rote calculation of a multiple of the debtor's "disposable income," it would more naturally have directed bankruptcy courts to "multiply" that figure by the number of months in the commitment period. The *amicus* brief of the National Association of Consumer Bankruptcy Attorneys advocating the mechanical approach implicitly concedes as much, noting that its reading "equates 'projected disposable income' with 'disposable income' 'projected' (or multiplied) over the plan period." NACBA Br. 17.[6]

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[6] In addition to the example in the text, section 507(a)(5)(b)(i) of the Bankruptcy Code, which predates BAPCPA, uses the term "multiplied" to calculate the maximum amount of a priority claim for employee benefit plans. BAPCPA subsequently used the term "multiplied" in four other provisions. §§ 704(b)(2), 707(b), 1322(d)(2) (computations requiring that current monthly income be "multiplied by 12"), & 1326(b)(3)(ii) (requiring that monthly payments not exceed a certain amount "multiplied by 5 percent").

In addition to § 1325(b), the Bankruptcy Code calls for disposable income to be "projected" in §§ 1129(a)(15)(B), 1222(a)(4), 1225(b)(1)(B), 1225(b)(1)(C), and 1322(a)(4). There is little authority on the meaning of "projected" under these

2. The conclusion that Congress intended the term "projected" to account for known changes is reinforced by the remainder of Section 1325(b)(1), which of course must be read as a whole. Congress specified that the debtor's "projected disposable income" is that which is "to be received" during her "commitment period." § 1325(b)(1)(B). But a mechanical multiplication of the debtor's previous "disposable income" would fail to assess accurately what income the debtor will actually receive during that period, in cases of changed circumstances. "If the debtor's income on Form 22C is artificially inflated (being in reality much lower when the plan is confirmed due to a lost job, for example), a mechanical projection based on that number would include income the debtor may never receive." *Nowlin*, 576 F.3d at 263.

Further, Congress directed the bankruptcy court to assess the debtor's projected disposable income at a particular time: "as of the effective date of the plan," § 1325(b)(1), which is the date on which the plan is confirmed and becomes binding, § 1327(a). By contrast, Congress elsewhere directed the bankruptcy court to make determinations as of the "date of the filing" of the plan. *E.g.*, § 1326(a)(1) (requiring the debtor to begin making payments "not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier"). Although the trustee is correct that "the effective date can be as

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provisions. None sheds light on the question presented here or otherwise suggests Congress's intention to adopt a mechanical approach.

soon as two months after filing," Pet. Br. 43–44, the relevant point is that Congress specified that the debtor's projected disposable income should *not* be determined as soon as she makes her bankruptcy filing. Section 1325(b) instead by its terms accounts for "evidence at the time of the plan's confirmation that may alter [her] historical calculation of disposable income." *Nowlin*, 576 F.3d at 263.

The trustee argues to the contrary that "there is nothing illogical or superfluous in language requiring that, as of the effective date of the plan, the plan provide that all of the resulting mathematical calculation (*i.e.*, projected disposable income) to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors." Pet. Br. 42–43 (citing *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio 2009)). But that misstates how the mechanical approach functions. A mechanical calculation of Lanning's projected disposable income – $1115 per month – will not in reality "be received [by her] in the applicable commitment period," because Lanning actually has only $144 a month in disposable income. For the same reason, the trustee's proposed payment to creditors – $756 per month – cannot "be applied to make payments." In any event, at bottom, the trustee cannot explain why Congress directed that disposable income should be projected "as of the effective date of the plan" if it instead intended that the bankruptcy court make a mechanical calculation based on information as it *previously* stood on the filing date.

3. Another provision of chapter 13 also contradicts the trustee's premise that Congress

intended the debtor's disposable income to be determined through a rigid calculation based exclusively on the six months immediately preceding the petition date. Section 1329 freely permits the bankruptcy court to address "circumstances that were unforeseen at the time of confirmation" by "modify[ing] the chapter 13 plan in response to prevailing conditions." 8 *Collier on Bankruptcy* ¶ 1329.01 (15th ed. rev. 2009). In this very case, Lanning received a settlement from a post-confirmation employer, $10,000 of which was allocated to distribution to her unsecured creditors. App. A, *infra*; *see also, e.g.*, *In re Baxter*, 374 B.R. 292 (Bankr. M.D. Al. 2007) (proceeds from a post-confirmation settlement warranted modification of plan under Section 1329). Conversely, a bankruptcy court may reduce the debtor's repayment obligations if, for example, she loses her job post-confirmation. *See, e.g.*, *In re Holley*, 138 B.R. 201, 202 (Bankr. S.D. Ohio 1992). Given that express power, the trustee's position reduces to the proposition that Congress intended strictly to forbid bankruptcy judges from considering any changes to the debtor's income and expenses that become apparent immediately prior to confirmation, but freely to permit those courts to consider indistinguishable developments that by coincidence happen to immediately follow confirmation. That makes no sense.[7]

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[7] Courts are divided over whether Section 1329 permits a bankruptcy court to modify the debtor's plan post-confirmation based on information available prior to confirmation, such as a pre-confirmation change in income. *Compare, e.g.*, *Ledford v. Brown*, 219 B.R. 191, 195 (B.A.P. 6th Cir. 1998) (permitted), *with, e.g.*, *In re Nelson*, 189 B.R. 748, 751 (Bankr. D. Minn.

4. Petitioner errs in contending that the forward-looking approach inappropriately "reads into the statute a presumption" that is "pure judicial invention." Pet. Br. 56. Courts regularly adopt presumptions to effectuate statutory standards that do not provide fine detail on how they should be implemented. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (right under federal statute is presumptively enforceable under 42 U.S.C. § 1983); *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988) (public information is presumptively relied upon by investors under SEC Rule 10b-5); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (presumption of purposeful discrimination that may arise in Title VII actions). Here, the text of Section 1325 is best understood as indicating Congress's determination that bankruptcy courts should begin from the premise that a debtor's "disposable income" will continue into the future, subject – through the word "projected" – to circumstances in which known or virtually certain differences in the debtor's income

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1995) (forbidden). But even if permissible, such a post-confirmation modification would not substitute for the requirements of Section 1325 because changes under Section 1329 need not comply with Section 1325's requirement that the debtor pay all her disposable income to creditors. *See* 8 *Collier on Bankruptcy* ¶ 1329.04[2] (15th ed. rev. 2009); *see, e.g., Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005). Applying Section 1329 to modify a plan on the basis of information that was available prior to confirmation would also further illustrate that Congress did not intend to fix the debtor's repayment obligation based on her disposable income in the six-month look-back period.

and/or expenses will cause a substantial difference in her disposable income during the commitment period.

Finally, there is no merit to the trustee's related contention that the forward-looking approach renders "the definition of 'disposable income'" a "'floating definition with no apparent purpose.'" Pet. Br. 41 (citations omitted). In fact, the definition of "disposable income" is always the starting point for determining the debtor's "projected" disposable income. In many cases, it will also be the end. When, as is often true, the case does not involve clearly changed circumstances, the bankruptcy judge need only multiply the debtor's "disposable income" by the commitment period. Further, even in those cases in which substantial changes are known or anticipated, the definition of "disposable income" continues to control the allowable categories of income and expenses. For example, a judge cannot include foster care payments in the income calculation, § 1325(b)(2), or refuse to consider expenses required to assist a disabled household member, § 707(b)(2)(A)(ii)(II). But within the categories permitted by the statute, a "court may consider reasonably certain future events" when projecting the debtor's income and expenses. *Nowlin*, 576 F.3d at 267.

B. The Mechanical Approach Gives Rise To Significant Anomalies That Contravene The Structure Of Chapter 13 And That Congress Could Not Have Intended.

The lower courts correctly recognized that only the forward-looking approach can be reconciled with

the basic structure of chapter 13, which calls for "a reality-based determination of a debtor's capabilities to repay creditors." *In re Frederickson*, 545 F.3d 652, 660 (internal citations omitted). For debtors who meet the statutory eligibility criteria, *see* §§ 109(e), 109(g), 109(h), chapter 13 both permits confirmation only if the debtor will "be able to make all payments under the plan and comply with the plan," § 1325(a)(6), and furthermore anticipates that an eligible debtor's projected disposable income will "be applied to make payments to unsecured creditors under the plan," § 1325(b)(1)(B).

The requirement that the debtor's plan be feasible in light of her actual economic circumstances is a defining feature of chapter 13. Congress specifically enacted chapter 13 in response to the recurring phenomenon, under the predecessor Chapter XIII of the Bankruptcy Act of 1898, of debtors proposing unrealistic compositions that they could not feasibly perform. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong. 160, at 12 (1973) ("1973 Commission Report") ("A considerable number of plans are proposed and confirmed, contemplating full payment over a three-year span, that are predestined to fail. Thus the mortality rate of Chapter XIII plans is high."). The 1977 House Report that led to the 1978 Bankruptcy Reform Act thus explained that "[t]he purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop *and perform under* a plan for the repayment of his debts over an extended period." H.R. Rep. No. 595, 95th Cong. 124, at 118 (1977) (emphasis added).

The mechanical approach cannot be reconciled with the basic structure of chapter 13 because it fails to provide for confirmed plans that reflect the debtor's actual ability to repay her creditors.[8]

1. Only the forward-looking approach properly accounts for debtors whose disposable income will be materially lower subsequent to the six-month look-back period.

The statutory structure demonstrates that Congress did not intend to impose the mechanical approach, because under that construction of Section 1325, many eligible chapter 13 debtors who suffer reduced incomes would be barred from relief. This is a recurring phenomenon. Studies indicate that bankruptcy filings are regularly triggered by unexpected, financially disruptive events that cause a loss in income. *See, e.g.*, Showel, *supra*, at 425.

Because in such a case the mechanical approach would forbid the bankruptcy court from

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[8] Commentators have thus correctly recognized that the forward-looking approach is the only realistic means of effectuating the purposes of chapter 13. *See, e.g.*, Thomas J. Izzo, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 Emory Bankr. Dev. J. 521 (2009); Matthew Showel, *Calculating Projected Disposable Income of an Above-Median Chapter 13 Debtor*, 21 Loyola Consumer L. Rev. 407 (2009); Chelsey W. Tulis, *Get Real: Reframing the Debate Over How to Calculate Projected Disposable Income in § 1325(b)*, 83 Am. Bankr. L.J. 345, 351 (2009).

"consider[ing] the changed circumstances and adjust[ing] the projection of income accordingly," it would deem the debtor "responsible for remitting income that does not exist." *Nowlin*, 576 F.3d at 263. In this case, for example, the trustee demands that Lanning do the impossible: make payments on the basis of income the trustee admits she will not receive. The trustee would require Lanning to pay her creditors $756 per month, J.A. 108, notwithstanding that such an inflated figure could not actually "be applied to make payments," § 1325(b)(1), because her disposable income during the "commitment period" would only total $144 per month, Pet. App. 57, 80. Because Lanning could not make the payments that the trustee would require, the bankruptcy court would be forbidden from approving her chapter 13 plan, notwithstanding that she is an eligible chapter 13 debtor. The trustee thus rightly "concedes that if [Lanning] is required to pay to unsecured creditors the disposable income calculation [under the mechanical approach], she may be effectively denied relief under chapter 13, in that it is likely impossible for the Debtor to propose a feasible plan." Pet. for Cert. 22 (emphasis added).[9]

Indeed, under the mechanical approach, Lanning might be precluded from bankruptcy relief

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[9] The trustee presses his reading of Section 1325 notwithstanding that, if Lanning suffered a loss of income the day *after* confirmation, the bankruptcy court indisputably would be free to account for that development under Section 1329. *See supra* at 23; *see, e.g.*, *In re Holley*, 138 B.R. 201, 202 (Bankr. S.D. Ohio 1992) (unexpected job loss after confirmation justifies modification of a plan).

altogether, given that her "current monthly income" calculation would trigger the presumption of abuse barring chapter 7 relief. *See* § 707(b)(2). But even if chapter 7 relief were available, shunting her to that alternative would be contrary to Congress's determination that "the rate of repayment to creditors would increase as more debtors were shifted into chapter 13 . . . as opposed to chapter 7." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 12 (2005). *See also id.* at 46 ("Most significant for creditors are provisions that are expected to shift some debtors from chapter 7 to chapter 13 bankruptcy proceedings and provisions that would expand the types of debts that would be nondischargeable."); 151 Cong. Rec. S1820, 1820 (Sen. Sessions) ("In some States, under 5 percent of the debtors go into chapter 13. That number ought to come up . . . ."); 151 Cong. Rec. S2306, 2315 (Sen. Feingold) ("[T]he bill's overriding purpose – the argument that we have heard over and over on the floor in the past week and a half – is to get more people to file for bankruptcy under chapter 13, which will require them to pay some of their debts over a 3- or 5-year period before getting a discharge of their remaining debts.").

At bottom, requiring debtors to propose plans based on income the bankruptcy court can reliably "project" they will not receive would effectively reintroduce the very problem Congress sought to overcome when it enacted chapter 13 in 1978: the imposition of infeasible payment plans. All the available evidence demonstrates that Congress did not intend such an odd result. BAPCPA was not intended to "deny anyone access to bankruptcy relief," but instead merely "requires those who have

the means to repay their debts" to do so. 151 Cong. Rec. S1726, S1788 (2005) (Sen. Hatch).

2. The mechanical approach implausibly reduces the repayment obligations of debtors who will have materially higher incomes subsequent to the six-month look-back period.

The results of the mechanical approach are no less anomalous with respect to debtors whose disposable incomes *increase* towards the end of the six-month look-back period. In such cases, the trustee's interpretation of Section 1325 would undermine BAPCPA's core purpose of ensuring that debtors fulfill their obligations to their creditors to the maximum extent possible.

In cases in which the debtor's average "current monthly income" during the six-month look-back period is lower than her actual income on the date of confirmation – for example, when the debtor secures a new, higher-paying job immediately before declaring bankruptcy – the mechanical approach excludes that higher income from the debtor's "projected" disposable income. *See In re Kagenveama*, 541 F.3d 868, 878 (9th Cir. 2008) (Bea, J., concurring in part and dissenting in part).

An example with estimated figures illustrates the point. Imagine a debtor who is unemployed and forced into bankruptcy as a result. In the month prior to filing, she secures a job with a salary of $40,000 per year. Her "current monthly income" (which would account for the unemployment payments she received prior to her new job),

§ 1325(b)(1), would likely be roughly $1000 per month. That might leave her with $50 per month in "disposable income." Under the mechanical approach, her "projected" disposable income over the entire length of a three-year commitment period would be only $1800.

The forward-looking approach, by contrast, looks to reality and requires the debtor to repay what she is genuinely able. In the hypothetical, as of the date of confirmation, a realistic assessment would recognize that the debtor actually had monthly income from her new job of roughly $3300, and disposable income of perhaps $700. Over a three-year confirmation plan, she would be required to pay $25,200, dramatically more than under the mechanical approach. Given Congress's determination in BAPCPA "to ensure that debtors repay creditors the maximum they can afford," H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005), it is much more reasonable to conclude that Congress intended that result.[10]

More troublingly, the trustee's interpretation would be an open invitation to abuse. The mechanical approach facilitates a debtor's strategic

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[10] Indeed, the prospect that many debtors will have higher incomes at the time of confirmation, but would prefer not to commit that income to repay their creditors, may explain why the National Association of Consumer Bankruptcy Attorneys – an organization of debtors' lawyers – has filed an *amicus* brief supporting the trustee's advocacy of the mechanical approach, NACBA Br. 16–17, and, alternatively, seeking to limit the categories of "income" that may be considered in any projection of the debtor's disposable income, *id.* at 36–39.

decision to time her bankruptcy filing to exclude periods of higher income from her statutorily prescribed "current monthly income," in order to minimize the amount she would repay her creditors under Section 1325(b)(1).

3. The trustee's suggested means of evasion do not support application of the mechanical approach.

The trustee attempts to play down these anomalous results by asserting that the debtor may invoke a number of statutory provisions to avoid them:

- The debtor may delay her bankruptcy filing, shifting the six-month look-back period to a later period of time, Pet. Br. 51;
- The debtor may seek leave to delay the filing of her Schedule I and ask the court to fix a different six-month look-back period pursuant to Section 101(10A)(A)(ii), Pet. Br. 52;
- The debtor may voluntarily dismiss her chapter 13 petition and refile it, Pet. Br. 53; and
- The debtor may convert her case to chapter 7 and, subject to the need to overcome the "presumption of abuse," assert that "special circumstances" authorize the filing, Pet. Br. 53–54.

The trustee's argument is flawed root and branch. At bottom, it is a concession that Congress did not intend chapter 13 to function as the

mechanical approach presumes: with the debtor's "projected" disposable income defined exclusively by reference to her six-month look-back period. The trustee embraces the proposition that these four mechanisms would instead facilitate bankruptcy courts' consideration of changed circumstances.

Further, the trustee's suggestion that this Court *encourage* manipulation of the bankruptcy system is in the teeth of Congress's determination to do precisely the opposite. *See* H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 5 (2005) ("[A] factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and – sometimes – even encourage opportunistic personal filings and abuse."); *e.g.*, § 362(c)(3) (limiting the protections of the automatic stay for debtors who have filed successive petitions). Provisions that the trustee describes as a mechanism to permit the bankruptcy court to account for a decrease in the debtor's income – for example, strategically securing a different six-month look-back period – would thus permit manipulation by an *increased*-income debtor who sought to insulate his disposable income from the obligation to repay his creditors.

There is furthermore significant doubt about whether the trustee's suggested means of evasion are in fact broadly available. For instance, a prospective debtor who delays filing a bankruptcy petition exposes herself to allegations of fraud and dishonesty that could lead to dismissal of her case. *See, e.g.*, *Neufeld v. Freeman*, 794 F.2d 149, 153 (4th Cir. 1986). In addition, if a debtor is aware that she will

have to file for bankruptcy yet delays her filing, any credit card debt she assumes in the interim might become exempt from discharge to the extent she does not reveal her intent to file. *See* § 523(a)(2).[11]

C. Respondent's Construction Of Section 1325(b) Is Confirmed By The Settled Interpretation Of The Statute Prior To BAPCPA's Enactment.

Congress first introduced the concept of "projected disposable income" into Section 1325(b) in the 1984 version of the statute, which defined "disposable income" but not "projected." That structure remained unchanged in BAPCPA, which modified the definition of "disposable income" but left "projected" untouched. The natural inference, particularly strong in the complex context of bankruptcy law, is that Congress intended to preserve the pre-BAPCPA interpretation of "projected." This Court has thus often said that it "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (quoted in *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); *Lamie v. U.S. Trustee*, 540 U.S. 526, 539 (2004); *Travelers Cas. and Surety Co. of Am. v. Pac. Gas and Elec. Co.*, 549 U.S. 443, 454 (2007)). The

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[11] In addition, as a practical matter, the timing of a bankruptcy filing is frequently urgent and not susceptible of delay, as debtors facing, for example, imminent foreclosure or a car repossession require the protection of the Code's automatic stay. *See* § 362.

lower courts correctly recognized that their adoption of the forward-looking approach is supported by pre-BAPCPA practice.

Prior to BAPCPA, projected disposable income was "a forward looking concept, requiring bankruptcy courts to 'project' the debtor's income into the future." Keith M. Lundin & Henry E. Hildebrand, *Section by Section Analysis of Chapter 13 After BAPCPA* 31 (2005). Though the question arose infrequently, *see In re Kolb*, 366 B.R. 802, 817 n.20 (Bankr. S.D. Ohio 2007), it was settled that the bankruptcy court in "projecting" the debtor's disposable income should account for known changes in circumstances. The then-current Collier treatise, for example, stated that courts should account for those changes in income "which can be clearly foreseen," 5 *Collier on Bankruptcy* ¶ 1325.08[4][a] (15th ed. rev. 1996), and bankruptcy courts consistently relied upon that guidance.[12] *See also Norton Bankruptcy Law & Practice* § 75.10 (1992) (deviations from present monthly income and expenditures are permitted in cases reflecting "extraordinary circumstances").

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[12] *See, e.g., In re Crompton*, 73 B.R. 800, 808 (Bankr. E.D. Pa. 1987) ("Collier suggests that . . . the court should focus upon the present monthly income and expenditures of the Debtor and, unless extraordinary circumstances are present, project these over the life of the Plan. We shall follow this common-sense advice . . . .") (citation omitted); *In re James*, 260 B.R. 498, 514 (Bankr. D. Idaho 2001) (quoting the Collier formulation with approval); *In re McGovern*, 278 B.R. 888, 895 (Bankr. S.D. Fla. 2002) (quoting same, with emphasis on "clearly").

The rule was that, "[i]f income is foreseeable at confirmation, it is included within projected disposable income." *In re Richardson*, 283 B.R. 783, 799 (Bankr. D. Kan. 2002). Bankruptcy courts thus would not permit "hopeless speculation," *In re Crompton*, 73 B.R. 800, 808 (Bankr. E.D. Pa. 1987), but would account for changes that were "subject to some showing of projectability," *In re Heath*, 182 B.R. 557, 559 (B.A.P. 9th Cir. 1995); *see also In re Bass*, 267 B.R. 812, 817 (Bankr. S.D. Ohio 2001). More recent rulings have confirmed that prior practice.[13]

The trustee makes a passing attempt to dispute the pre-BAPCPA practice, arguing that some courts had held that a "debtor's 'projected disposable income' was a 36-month multiplier of her monthly income." Pet. Br. 36. But none of those cases involved a known or clearly foreseeable change in circumstances. *See In re Killough*, 900 F.2d 61 (5th

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[13] *E.g.*, *In re Brady*, 361 B.R. 765, 769 (Bankr. D.N.J. 2007) (Before BAPCPA, disposable income "would be projected forward by multiplying it times the number of months in the debtors' plan, with flexibility to accommodate for 'virtually certain' changes."); *see also Nowlin*, 576 F.3d at 265 n.9; *In re Kibbe*, 361 B.R. 302, 307 n.5 (B.A.P. 1st Cir. 2007); *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W. Va. Jan. 23, 2008); *In re Jass*, 340 B.R. 411, 417 (Bankr. D. Utah 2006). The single bankruptcy judge who stated the contrary view – that "[u]ntil BAPCPA became effective in 2005, 'projected disposable income' was determined by mathematically projecting a debtor's 'disposable income' over the number of months in the applicable commitment period" – notably cited no pre-BAPCPA authority for that proposition and acknowledged the contrary understanding of the Fifth Circuit. *In re Boyd*, 414 B.R. 223, 229 (Bankr. N.D. Ohio 2009).

Cir. 1990) (holding that, although the debtor had a history of earning overtime pay, such earnings were not sufficiently certain to be "projected" as part of her disposable income); *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355 (9th Cir. 1994) (holding that the trustee could not require debtor to guarantee in advance the payment of all actual disposable income over the life of the bankruptcy plan); *In re Solomon*, 67 F.3d 1128 (4th Cir. 1995) (holding that, when the debtor was not required to and did not intend to draw income from his individual retirement account, income from that account could not be "projected"). The Fifth and Ninth Circuits followed Collier in stating that projection was "*usually*" accomplished by multiplication, *Killough*, 900 F.2d at 64 (emphasis added); *Anderson*, 21 F.2d at 357 (same), and notably cited with approval the section of Collier stating that courts should account for clearly foreseeable changes in income, *ibid.* The Fourth Circuit endorsed and echoed the holding of the Ninth Circuit. *In re Solomon*, 67 F.3d at 1132.[14]

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[14] Thus, when pre-BAPCPA courts were unwilling to account for changes in income and expenses, that was because the changes were too uncertain to be reliably projected. For example, when asked to project salary raises that a debtor might receive, a court would often respond that, "[e]arnings above and beyond the amount scheduled are too speculative at this point as to be regarded as 'projected' income. Since there are no changes in income which can be clearly foreseen, the Court must simply multiply the debtor's current disposable income by 36 in order to determine his 'projected' income." *In re Krull*, 54 B.R. 375, 378 (Bankr. D. Kan. 1985); *see also In re Easley*, 72 B.R. 948, 949 (Bankr. M.D. Tenn. 1987) (Lundin, B.J.) ("The plan does not commit future pay increases, but there

Nor is there merit to the trustee's reliance on pre-BAPCPA decisions holding that Section 1325 required a debtor to pay her "actual [disposable] income, over the life of the plan, as opposed to what one might estimate at the time of confirmation." Pet. Br. 36. In these cases, a minority of bankruptcy courts broadly required a debtor to pay her *actual*, rather than her *projected*, disposable income over the life of her confirmed plan, whatever that amount turned out to be. For example, these courts would allow trustees to require debtors to sign a "Best Efforts Certification," committing the debtor to pay any disposable income that she received in addition to what had been projected at the time of her confirmation hearing. These courts interpreted "projected" in Section 1325 either to be meaningless or to mean "periodically re-calculated."

That reading of Section 1325 was unsound. It was a minority position that was rejected by the only circuit to squarely consider it: the Ninth Circuit forbade such certifications, *Anderson*, 21 F.3d at 356–57, and other jurisdictions followed suit, *e.g.*, *In re Bass*, 267 B.R. at 818. It was also widely disparaged in the scholarly treatises. *E.g.*, 5 *Collier on Bankruptcy* ¶ 1325.08[4][a] (15th ed. rev. 1996). One

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was no evidence that raises are likely."). Courts similarly found that increases in the billable hours of a law firm partner, *In re James*, 260 B.R. 498, 515 (Bankr. D. Idaho 2001), and proceeds from a small-time dairy operation, *In re Schyma*, 68 B.R. 52, 63 (Bankr. D. Minn. 1985), were too uncertain to be reliably projected. *See also, e.g.*, *Norton Bankruptcy Law & Practice* § 75.10 (1992) ("many courts have refused to 'project' raises, bonuses or overtime absent evidence that the future changes in income are certain").

treatise noted that "[i]ncluding future changes in income quickly becomes an administrative nightmare" because "[t]he Chapter 13 trustee would have to periodically review every pending Chapter 13 case" to determine whether disposable income should be adjusted. 2 Keith M. Lundin, *Chapter 13 Bankruptcy* 5-35 (2d ed. 1994).[15]

In sum, given that Congress in BAPCPA conspicuously did not alter the meaning of "projected," the most reasonable conclusion is that it did not intend to depart from the prior, "forward looking" construction of Section 1325.

II. PETITIONER'S ATTEMPTS TO DEFEND THE MECHANICAL APPROACH AS CONSISTENT WITH THE BANKRUPTCY CODE FAIL.

A. Petitioner's Reliance On BAPCPA's Changed Definition Of "Disposable Income" Is Misguided.

1. Petitioner principally contends that Congress compelled bankruptcy courts to use the mechanical approach when it changed the definition of "disposable income" in BAPCPA. The statute

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[15] Although the trustee cites three appellate cases, two of them did not concern the requirements of § 1325(b), but only interpreted the requirements of the particular plans to which those debtors had agreed. *See In re Midkiff*, 342 F.3d 1194, 1202 (10th Cir. 2003); *In re Freeman*, 86 F.3d 478, 481 (6th Cir. 1996). The third case arose instead under chapter 12, and itself recognized that its ruling was contrary to the statutory text. *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994).

redefined "disposable income" as "current monthly income," minus "reasonably necessary" expenses. § 1325(b)(2). BAPCPA's definition of "current monthly income," in turn, specified categories of recognized income. § 101(10A)(B). BAPCPA also provided detailed guidance about the types and amounts of "reasonably necessary" expenses for above-median debtors. § 1325(b)(3) (incorporating § 707(b)(2)).

Preliminarily, the most salient point, of course, is that Congress did not define the term "projected" but instead tellingly left the pre-BAPCPA application of the forward-looking approach unaltered. *See* Part I.C, *supra*. The trustee nonetheless argues that the detailed provisions which Congress did adopt demonstrate Congress's determination to reduce the discretion of bankruptcy judges. That is true, but not in a sense that supports imposition of the mechanical approach to interpreting "projected." Congress was instead clarifying the meaning of the term it redefined – "disposable income" – in order to resolve the prior inconsistencies in courts' interpretation of that particular term.

Before BAPCPA, Section 1325(b) had vaguely defined "disposable income" as the difference between the debtor's income and "amounts reasonably necessary to be expended" for the support of the debtor and her dependents and the operation of the debtor's business. The ambiguity of that definition gave rise to disputes and inconsistent results. BAPCPA reduced judges' "discretion" and produced uniformity by more specifically identifying the

categories of relevant income and permissible expenditures.

BAPCPA thus provided guidance regarding several categories of income. For example, the statute resolved the conflict over whether to include Social Security benefits as income. *See supra* at 6. *See also, e.g.*, §1325(b)(2) (child support payments not included in calculation of "disposable income").

With respect to expenses, BAPCPA eliminated, for example, the division over the treatment of tuition. *See supra* at 6. *See also, e.g.*, § 707(b)(2)(ii)(V) (method for calculating home energy costs). More broadly, BAPCPA's specificity reduces the necessity for individual bankruptcy judges to decide "difficult questions of lifestyle and philosophy" that previously were bound up in the inquiry into "reasonably necessary" expenses, *Norton Bankruptcy Law & Practice* § 75.10 (1992), such as whether debtors should be allowed expenses for recreation. *See also* Keith M. Lundin, 2 *Chapter 13 Bankruptcy* 5-102 (2d ed. 1994) ("Determining reasonably necessary expenses drags the bankruptcy court into approving or disapproving of the debtor's lifestyle.").[16]

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[16] *Compare, e.g., In re Messenger*, 178 B.R. 145, 147 (Bankr. N.D. Ohio 1995) (allowing $125 monthly recreation allocation), *with In re McCormack*, 159 B.R. 491, 496 (Bankr. N.D. Ohio 1993) (recommending elimination of $113 recreation allocation). Courts made judgments about everything from tobacco expenses, *see, e.g., In re Woodman*, 287 B.R. 589, 597 (Bankr. D. Me. 2003) ($240 monthly tobacco habit was a reasonable expense), to tithing, *see, e.g., Waguespack v. Rodriguez*, 220 B.R.

The conclusion that Congress intended to reduce judges' discretion in recognizing categories of income and expenses is apparent not only from what Congress actually did – changing the definition of "disposable income" while *not* adding a definition of "projected" – but also from the legislative history. In early debates, supporters argued that uniform standards under Section 1325 would prevent "case-by-case" determinations in which "reasonable" expenses were "bound only by the limits of the debtor's imagination or the discretion of the judge," 145 Cong. Rec. H2655, H2721 (1999) (Rep. Bryant), whereas the pre-BAPCPA regime allowed "a wealthy person [to] be subject to one standard for living expenses while the working man or woman [was] subjected to another one," *id.* at 2664 (Rep. Menendez). *See also id.* at 2721 (1999) (Rep. Royce) (citing an example in which, under the previous system, a judge might allow a family "$600 entertainment and the $270 cell phone calls per month" after bankruptcy).

2. The trustee's contrary position is not supported by BAPCPA's definition of "current monthly income" as the debtor's "average monthly income from all sources that the debtor receives . . . during the [prior] 6-month period," § 101(10A). The trustee suggests that, by fixing a particular historical period as determinative of the debtor's "current" income, Congress implicitly intended to forbid the bankruptcy court from accounting for clearly

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31 (W.D. La. 1998) (amount tithed to church included in debtor's gross income).

foreseeable changes in the future in determining "projected" disposable income. Pet. Br. 52. The trustee misapprehends both the statutory text and its structure.

In specifying a six-month look-back period, Congress merely resolved an ambiguity in the pre-2005 version of chapter 13, which had failed to specify the relevant period for determining the debtor's current income. Many debtors experience *some* ordinary variability in their incomes; one month will not precisely match another. But the relevant bankruptcy form at the time only vaguely called for the debtor to report her "average income" and "current wages." Some available guidance suggested that debtors with non-uniform income should use a six-month average, but the practice of bankruptcy judges was inconsistent. *See supra* at 4-5; *see also, e.g.*, John H. Williamson, *The Attorney's Handbook on Consumer Bankruptcy and Chapter 13*, at 141 (26th ed. 2003) ("If the debtor's income varies seasonally, a realistic average should be used if feasible.").

The provision of BAPCPA on which the trustee relies merely adopted the term "current" from the then-current bankruptcy form and codified the suggested six-month period for determining an average. The text speaks for itself: the six-month look-back period specifies how to determine the debtor's "current" income. Congress thus decided, quite reasonably, that the most reliable estimation of the present could be achieved by looking at several months of available data.

The look-back period notably does not speak to the question presented by this case, which is how to determine the disposable income that the debtor will receive during the subsequent duration of the commitment period. Indeed, there is a stark linguistic contrast between the debtor's "*current*" monthly income and her "*projected*" disposable income. The trustee's position might have force if Congress in BAPCPA had not only adopted the six-month look-back period but also *deleted* the term "projected," but it instead left unaltered bankruptcy courts' consistent practice of considering known changes in calculating the debtor's "projected" disposable income. *See* Part II.C, *supra*.

3. Nor is there merit to the trustee's final textual argument that Section 1325(b)(2)'s definition of "disposable income" as determined by the debtor's six-month look-back period actually extends to the entire phrase "projected disposable income." *See* Pet. Br. 38–39. Petitioner notes that Section 1129(a)(15) refers to "the projected disposable income of the debtor (as defined in section 1325(b)(2))." Pet. Br. 39. Contrary to the trustee's submission, the cross-reference in Section 1129 is simply ambiguous: it does not specify whether it is directing the reader to Section 1325(b)(2) for a definition of "disposable income," "projected disposable income," or even simply "debtor." But that ambiguity is easily resolved by the text of Section 1325(b)(2) itself. That provision by its terms includes *only* a definition of "disposable income," not "projected disposable income." As the Collier treatise explains, "'Disposable income' is a concept borrowed from chapter 13. Indeed, section 1129(a)(15) itself refers

to section 1325(b)(2) for a definition of the concept . . . Section 1129(a)(15)(B) specifically provides that 'disposable income of the debtor' is used 'as defined in section 1325(b)(2).'" 7 *Collier on Bankruptcy* ¶ 1129.02 (16th ed. 2009).

Petitioner himself seemingly recognizes as much when he notes that "projected disposable income" "has never been specifically defined" in the statute. Pet. Br. 17. Further, not even the trustee actually believes that "Congress considered § 1325(b)(2) to define 'projected disposable income,'" *contra* Pet. Br. 39, because even the mechanical approach requires taking the further step of multiplying the debtor's "disposable income" by the number of months in the plan.

B. Petitioner's Reading Of The Legislative History Of BAPCPA Is Misguided.

Petitioner maintains that "the legislative history of this statute is conclusive" in establishing that Congress intended courts to apply the mechanical approach. Pet. Br. 24. In fact, as discussed above, that construction of Section 1325 contradicts both of the overriding goals that are most prominently stated in BAPCPA's legislative history. The trustee's reading would require many reduced-income debtors to pay more than they can afford, and indeed would disentitle eligible debtors such as Lanning from chapter 13 relief. *See* Part I.B.1, *supra*. Conversely, when the debtor's income increases, the trustee's reading will fail to require debtors to pay to creditors disposable income that they will in fact receive. *See* Part I.B.2, *supra*.

Petitioner ignores the animating purposes of BAPCPA and relies instead on isolated statements by Senator Charles Grassley five years before the statute's enactment. *See* Pet. Br. 28–29. Petitioner places undue weight on the views of a single member of Congress, particularly given that the statements in question do not purport to address the precise question at issue here. Further, it is uncertain what view the Senator would have had on this question. Senator Grassley seemingly rejected a reading of BAPCPA that would take a rigid view of the debtor's income. *See* 146 Cong. Rec. S11683, S11703 (2000) ("As with the means test, adjustments are also permitted to income or expenses based on the 'special circumstances' provisions of the means test."). Notably, this statement immediately precedes Senator Grassley's statement (on which petitioner heavily relies) suggesting that he expected the debtor's monthly income to be multiplied by the duration of the plan. *Ibid.*

Nor is there merit to petitioner's assertion that Congress in adopting the definition of "disposable income" implicitly rejected the objections of chapter 13 trustees that "above median income debtors might pay less than they would prior to BAPCPA." Pet. Br. 34. Petitioner gives no reason to believe that Congress considered this objection in any detail. Petitioner's argument traces to a single email from one chapter 13 trustee cited in a law review article. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am. Bankr. Inst. L. Rev. 665, 682 n.85 (2005). Even that email does not speak to the question presented here. The trustees were

concerned with the computation of the debtor's "disposable income," which is the same under either the mechanical or forward-looking approaches. *Ibid* (trustees had urged Congress to make "current monthly income," less expenses, a floor for a debtor's "disposable income"). The trustees seemingly raised no issue with regard to the method of "projection," a silence that in fact strongly suggests that they understood that BAPCPA would not disturb the prior, settled application of the forward-looking approach. *See* Part I.C, *supra*.[17]

C. Petitioner Errs In Contending That Congress Compelled Bankruptcy Courts To Use The Mechanical Approach By Excluding The Chapter 7 Means Test With Respect To Income From Section 1325.

The trustee finally contends that the mechanical approach is inferentially supported by the fact that Congress in BAPCPA did not permit bankruptcy courts to consider "special circumstances" in computing the debtor's "current monthly income." *See* Pet. Br. 46. But that proves nothing material. The concept of "special circumstances" does not

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[17] Senator Russell Feingold proposed an amendment to the bill that would have allowed adjustments for a debtor whose actual future income would deviate from her statutorily defined "current monthly income." 151 Cong. Rec. S2306, S2315 (2005). Petitioner correctly does not rely on this proposed amendment, which was never brought to a vote. There is no evidence that Congress failed to consider the amendment based on a determination to adopt a mechanical interpretation of "projected" disposable income.

supplant the settled prior meaning of "projected," which BAPCPA did not modify, and which is the mechanism through which courts have long accounted for changed circumstances in the debtor's income and expenses that were known prior to confirmation.

The trustee responds that Congress *did* permit the court to consider "special circumstances" in determining the debtor's "reasonably necessary" expenses. *See* § 1325(b)(3) (incorporating § 707(b)(2)(B)). But that is easily explained as well. For above-median debtors, BAPCPA introduced a relatively rigid structure of recognized expenses. § 707(b)(2); *accord* Pet. Br. 19–20. The "special circumstances" provision permits debtors to justify departures from those categories in individual cases in order to lower the calculation of their "disposable income." The Collier treatise thus notes that

> special circumstances could be. . . the moving expenses, security deposit, and other costs that would be incurred if the debtor moved to a lower rent apartment. There are many other possibilities, such as high commuting costs, the increased price of gas, expenses for business use of a car over and above normal use, the additional housing cost necessary to live near an appropriate school for a special needs child, costs of a separate household and commuting necessitated by employment, married debtors' need to maintain two separate households, security costs in dangerous neighborhoods or the cost of infant formula and diapers.

6 *Collier on Bankruptcy* ¶ 707.05[2][d] (15th ed. rev. 2009).

There is accordingly no anomaly in the fact that, with respect to expenses, Congress both permitted debtors to claim "special circumstances" and also called for a debtor's disposable income (including her expenses) to be "projected." A "special circumstance" addresses the atypicality of the debtor's present situation, *see In re Briscoe*, 374 B.R. 1, 18 n.19 (Bankr. D.D.C. 2007), such as when the debtor suffers from "a serious medical condition" requiring costly treatment. § 707(b)(2)(B)(i). The "projection" of the debtor's disposable income addresses a change in the debtor's circumstances. For example, the debtor may have begun treatment for her illness immediately prior to confirmation, and the costs of that treatment may therefore not yet be reflected in her monthly expenses. Without "special circumstances," a debtor could never account for the extraordinary cost of her medical treatment. And without "projected," a debtor could only account for the costs of such treatment to the extent that they were already reflected in her average monthly expenses.

With regard to income, on the other hand, there would be no separate, analogous role for "special circumstances," because the term "projected" fully accounts for situations in which a debtor's "current monthly income" is a poor predictor of her future income. In light of that redundancy, Congress naturally did not include "special circumstances" for income in Section 1325. And so it is that "[i]n the case of expenses, but not in the case of income, it was

necessary for § 1325(b)(3) to incorporate § 707(b)(2)(B) in the calculation of disposable income for an above-income median income debtor." *In re Briscoe*, 374 B.R. at 18 n.19.[18]

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[18] The question presented by this case does not affect either the valuation of a chapter 13 debtor's existing assets or her obligation to contribute that value to repay creditors. For example, if at the time she declared bankruptcy, Lanning's buyout from Payless were on deposit in her bank account, the choice between the forward-looking and mechanical approaches would not affect the determination of whether those funds were an asset of the estate. § 1306(a) (incorporating § 541, which in turn broadly defines the debtor's property to include all her property, subject to specified exceptions); *see also* § 1325(a)(4) (providing that creditors in a chapter 13 proceeding receive "not less than the amount" they would have received had it been liquidated); § 726 (providing for the distribution of an estate's property to creditors in a chapter 7 proceeding).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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January 27, 2010

APPENDIX

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

Stephanie Kay Lanning
Debtor Case No. 06-41037-13

ORDER ALLOWING MOTION TO APPROVE EMPLOYMENT SETTLEMENT, TO RATIFY EMPLOYMENT OF COUNSEL AND FOR ADDITIONAL ATTORNEY FEES

It now comes before this Court the Debtor's Motion to Approve Employment Settlement, to Ratify Employment of Counsel and for Additional Attorney Fees filed herein on June 11, 2008.

WHEREUPON, the Court finds that the Trustee's Objection has been resolved and no other response thereto has been filed.

WHEREUPON, the Court further finds that the Debtor has settled an employment case.

WHEREUPON, the Court further finds that Kristi Kingston of Bratcher Gockel & Kingston L.C. has represented her in these proceedings.

WHEREUPON, the Court further finds that the employment of Kristi Kingston and the payment to her law firm are hereby ratified.

WHEREUPON, the Court further finds that there has been a settlement and the terms of the

settlement are confidential (a copy of the settlement was provided to the Trustee).

WHEREUPON, the Court further finds that all parties have agreed the Debtor shall place 1/3 of the Debtor's portion of the settlement in an interest bearing account for payment of taxes. The remaining balance of the Debtor's portion is to be split 50/50 between the Debtor and the estate.

WHEREUPON, the Court further finds that the Debtor shall be permitted to pay additional attorney fees in the amount of $150.00 in full through the Plan.

WHEREUPON, the Debtor's Motion to Approve Employment Settlement, to Ratify Employment of Counsel and for Additional Attorney Fees should be and is hereby permitted as filed with payments to be $144.00 per month.

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11 U.S.C. § 101. Definitions

(10A) The term "current monthly income" –

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

11 U.S.C. § 1325. Confirmation of plan

(b)

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended –

(A)

(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 575 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than –

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 575 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

REPLY BRIEF

Supreme Court, U.S.
FEB 26 2010

No. 08-998

In The
Supreme Court of the United States

JAN HAMILTON,
CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

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ARGUMENT

I. Fundamental Interpretative Errors Of Debtor And Her *Amici* Result In A Faulty View Of The Chapter 13 Means Test.

The Chapter 13 version of the means test consists of three pertinent statutes. Those statutes are:

- "Disposable income" and allowed expenses (§1325(b)(2) and (3)),
- "Means test" (§707(b)(2)(A) and (B)),
- "Current monthly income" (§101(10A)(A)(i) and (ii)).[1]

A. Debtor And The United States Fail To Properly Consider The Lynchpin Statute, §101(10A).

Debtor ignores the third corner of the statutory triad.[2] 11 U.S.C. §101(10A) provides, in relevant part:

> (10A): The term "current monthly income" –
>
> (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether

---

[1] Unless otherwise noted, all statutory references are to the current version of 11 U.S.C.

[2] Respondent Stephanie Lanning is identified as "Ms. Lanning" or "Debtor." "The United States" is identified as such. The *amicus* party Ned W. Waxman is identified as "Waxman."

> such income is taxable income, derived during the 6-month period ending on –
>
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii). . . . (subsection (B) omitted as not relevant here).

Debtor only mentions, without analysis or discussion, §101(10A)(A)(ii) in her attempted explanation of why judicial discretion should be resurrected, when Congress mandated otherwise.[3] This omission is fatal to her cause. Necessarily, her conclusions are wrong, since she does not consider all of the operative statutes. The interplay of the three statutes requires a non-discretionary application of the Chapter 13 means test formula, except to the extent expressly

---

[3] Debtor argues that somehow this provision resolves an ambiguity in the pre-2005 code for determining debtor's current income. Resp.Br. 43. This argument is made of whole cloth and is unsupported by either the text of the provisions at issue or any pertinent legislative history. The prior law simply allowed substantial judicial discretion, while the current law largely does not. By definition, the prior version of §1325(b) would, and did, lead to varied results. Congress sought to change that. Pet.Br. 28.

provided. This formula is only used in the Chapter 13 plan confirmation process, if invoked by a proper party in interest.[4] Pet.Br. 4.

The manner in which these statutes complement each other is not complicated and is straightforward. "Disposable income" is now "current monthly income," as determined by §101(10A), minus allowed expenses as determined by §1325(b)(3) and §707(b)(2)(A) and (B), as incorporated. On the expense side, the only deviations permitted are ones in accord with §707(b) – where debtor may plead "special circumstances." The only discretion given to bankruptcy judges on the income side is the ability to determine *which* 6-month period is to be examined by the formula. §101(10A)(A)(ii). If Congress intended that bankruptcy courts retain the power to exercise discretion by ignoring or deviating from the formula, there would have been no need for subsection (ii) of §101(10A)(A). Debtor's forward-looking interpretation necessarily reads subsection (ii) completely out of the statute.

While the Debtor concedes the sanctity of the expense formula in §1325(b)(3) and §707(b)(2)(B), the United States hints at disputes on other issues.

---

[4] Debtor refers to Chapter 13 plans as "wage earner plans." Resp.Br. 2. This is an archaic term, formerly used in Chapter XIII, which came into existence in the 1938 Chandler amendments to the Bankruptcy Act of 1898. The 1978 Code, and now BAPCPA, requires a debtor to have regular income, which may or may not be "wages." §109(e). Payments are generally made through the Chapter 13 trustee. §1326(a)(1) and (2).

Resp.Br. 40. Essentially, the United States supports judicial discretion on the expense side of the equation, as well as the income side. U.S.Br. 12. Although expenses are not per se at issue here, the ramifications of discarding the language of §707(b)(2)(B) are enormous. The United States notes *In re Turner*, 574 F.3d 349, 355-356 (7th Cir. 2009), which involves issues pertaining to the deduction of expenses. U.S.Br. 21. That case is representative of the issues that may occur on the expense front. The United States' musings are not developed into argument made applicable to Debtor's circumstances. The point to be made here is that the United States supports, across the board, a view of both the income and expense formulas for Chapter 13, which necessarily requires that the statutes be ignored and judicial discretion be substituted. If the means test is not performing as advertised, the remedy is for Congress to change the statutes, rather than for the courts to rewrite the provisions on an ad hoc basis. Congress required that deviations on the expense side were to be determined by a "special circumstances" process, as set out in §707(b)(2)(B). However, there are no facts at issue here that bring the "special circumstances" procedure into play.

The United States argues that exercising §101(10A)(A)(ii) requires the debtor to violate §521(a)(1)(B)(ii), and could lead to dismissal of the case, because the filing of a Schedule I is mandatory *unless excused by the court*. U.S.Br. 31. The United States properly implies the solution to this apparent

dilemma. *Id.* A debtor may file a motion to ask the court to excuse the debtor from filing Schedule I. *In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009); Pet.Br. 52; *see* Sec. II.A.2, *infra*. The granting or denial of this motion is discretionary, as §101(10A) does not confer upon debtors the absolute right to that relief, so abuses of the system are still subject to the checks and balances of "contested matter" procedure. *See* n.14, *infra*. Such a course is consistent with both §101(10A) and §521(a).[5]

Ultimately, Debtor and the United States suggest judicial revisions to BAPCPA, rather than applying the statutory provisions as enacted.

B. Only The Trustee's View Of "Projected" And "Effective Date Of The Plan" Is Consistent With The Text And Legislative History Of §1325(b) And Related Statutes.

Fundamental to the interpretative errors of Debtor and the United States is their insistence on rewriting these statutes because of claimed difficulty in applying the phrases "projected disposable income" and "effective date of the plan" to the BAPCPA amendments. They ignore applicable legislative history as

---

[5] Fed.R.Bankr.P. 1007(c) permits debtors to file the bankruptcy petition without schedules, and to file schedules 14 days later, or even at some other date as may be permitted by the bankruptcy court.

well as the precise text of the statutes. These words and phrases are not troublesome unless one ignores §101(10A), particularly the disjunctive of subsection (ii).

Debtor's explanation of how §1325 works is mostly wrong.[6] What she does correctly state is not helpful to her position. She says, "The debtor's 'projected' disposable income is her 'disposable income' multiplied by the number of months in the commitment period, except in the unusual case in which known or virtually certain differences in the debtor's income and/or expenses will cause a substantial difference in her disposable income during the commitment period." Resp.Br. 15. Debtor properly concedes it is necessary to use a multiplier. She also agrees that "projected disposable income" is "disposable income" multiplied. *See* Sec. I.B., *infra*. However, the rest of the quoted paragraph is not accurate and is inconsistent with the Chapter 13 means test.

Debtor argues the phrase "effective date of the plan" is inconsistent with the assertion that the bankruptcy court must make a mechanical calculation based on debtor's income as it stood before the bankruptcy

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[6] Debtor also states that expenses for above median income debtors are determined under "standard schedules." Resp.Br. 6. It is unclear as to what Debtor is asserting here, as that phrase is not a part of the Chapter 13 lexicon. If Debtor means Schedules I and J, then she is incorrect. For an above median income debtor like Ms. Lanning, §1325(b)(1) and (2) determine allowed expenses, incorporating §707(b).

was filed. Resp.Br. 21-23. Debtor misinterprets the application of the new provisions in reaching that result. If a debtor disagrees with the 6-month look back conclusion, then the debtor may ask that the 6-month time frame be moved. It is that simple. Again, by ignoring §101(10A)(A)(ii), the debtor reaches an inaccurate conclusion from a false or incomplete premise.

Debtor's conclusion that the Trustee reads "projected" out of §1325 is simply not accurate.[7] Resp.Br. 19. The Trustee views "projected" as being the multiplier Congress intended. Debtor states Congress would have used the word "multiplied" if it had intended such. Resp.Br. 19-20. This argument ignores the obvious. A multiplication is inherent in any plan calculation in order to "project" forward debtor's "disposable income" over the life of the plan under *both* the mechanical *and* the forward-looking approaches. There is simply no other way to get from a monthly amount to a total amount to be paid. The utilization of a multiplier in order to determine what should be paid to creditors is necessary and implicit within both the present and prior statute. This point is conceded, properly and by necessity, although Debtor argues weakly to the contrary. She admits, "The debtor's 'projected' disposable income is her 'disposable income' multiplied by the number of months in the

---

[7] Debtor, while complaining that the Trustee ignores "projected," tosses out §101(10A)(A)(ii) entirely.

commitment period. . . ." Resp.Br. 15; *also* Sec. I.A., *supra*. So, when all is said and done, Ms. Lanning's argument on this point is not credible. She first admits the proposition, then argues against it. Resp.Br. 15; *contra* Resp.Br. 19-20. The Trustee honors the word "projected" in the context of "disposable income," as it makes perfect sense in both its meaning and application, when considered in light of all of §101(10A).

Debtor argues that case law prior to BAPCPA settled issues surrounding the word "projected." Resp.Br. 34. She misapprehends the pre-BAPCPA "projected versus actual" dispute. Resp.Br. 36-39. Without question, the issue of when the debtor's income was to be determined under pre-BAPCPA law generally was one made at or near confirmation. Pet.Br. 35-38. Both Debtor and the Trustee cite to pre-BAPCPA cases involving pre-confirmation issues. Pet.Br. 36; Resp.Br. 36. However, it is important to highlight the point Debtor and her *amici* skip – *the standards were different. Congress changed the law.* Debtor's argument, based on her belief that the mechanical approach cannot be reconciled with the basic structure of Chapter 13, is wholly mistaken. Resp.Br. 25-26. To get to that conclusion she must, and does, completely ignore the fact that the new statute changed the structure of Chapter 13. The point made by the Trustee was that pre-BAPCPA, courts determined a number, pre-confirmation, as "disposable income" and projected it forward by multiplying. Pet.Br. 36-38. Even Debtor concedes that

this was generally the approach. Resp.Br. 37. This was unchanged. What changed is that Congress has now provided a formula for how that number is to be determined. Arguments that this pre-BAPCPA body of law was preserved ignore those statutory changes.

The United States notes that Congress intended to curtail discretion of bankruptcy judges in determining what sources of revenue count as income. But, in the same breath, it discounts everything else in §101(10A). Despite the United States' attempts to reap the benefits of one part of that statute, without accepting the consequences of the rest, it is very apparent that Congress' intent was to effect much more than a mere definitional change. The three statutes, when read together, constitute a formula. The new statute unequivocally creates a new standard, across the board, for determining what constitutes "disposable income." U.S.Br. 24.

Ms. Lanning's real complaint is that *the dollar figure to which the multiplier is applied is not the one she wishes.* Debtor protests that her "disposable income" cannot possibly be properly "projected" by multiplying her average monthly "disposable income" of the prior six months. Resp.Br. 19. Although expressing incredulity at her plight, she does not address the real reason her statutorily derived average "disposable income" does not reflect her actual circumstances. *She used the wrong portion of §101(10A). She used subsection (i) and should have used subsection (ii).* Of course, she had other options, also not exercised, which are discussed in Sec. II.A., *infra*.

C. Interjection Of A Presumption Into The Chapter 13 Means Test Is Not Supported By The Text Of §1325.

Debtor favors the Tenth Circuit's finding of an unwritten presumption in §1325(b). Resp.Br. 24. Debtor, as well as the Tenth Circuit, ignores directly related statutes, which are at odds with that interpretation. This imagined presumption is not supported by the text of the interrelated statutes or the legislative history. If Congress wanted to invoke a presumption, it could have done so, knew how to do so, and did so in a statute directly related to §1325. *See* §707(b)(2)(A)(i) ("In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court *shall presume* abuse exists. . . .") (emphasis added). A more parsimonious view is to read §1325(b) as written, and intended, without judicial edits.

It makes no sense to create a formula, and then permit bankruptcy judges to ignore the entire schema. This is the net effect of any version of the forward-looking approach. If it is correct that judges still have such discretion in determining "disposable income," then §101(10A)(A)(ii) is completely superfluous, and that section would have no meaning. This Court should adopt a reading that does not treat statutory terms as mere surplusage. Pet.Br. 40, *citing Williams v. Taylor*, 529 U.S. 362 (2000).

As in *Lamie*, if there is a mistake, omission or ambiguity here, it is up to Congress to fix it, not for

the courts to rewrite the statute. *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004). Debtor essentially upends the statute with her view of a single word – "projected." Debtor's view restores judicial discretion to the "disposable income" analysis, when Congress intended otherwise. Pet.Br. 26-30.

D. The "Non-Presumptive" §105(a) Approach Cannot Properly Be Substituted For The Prescribed Chapter 13 Means Test.

Amicus Waxman, in support of Debtor, interjects into the discussion a so-called "novel approach," utilizing the court's equitable powers under §105(a). Waxman Br. 2. However, the use of §105(a) here is neither novel nor appropriate. It is not by accident that the parties, the bankruptcy court, the BAP, and the Tenth Circuit did not so much as mention §105(a). The non-presumptive approach is just another subset of the forward-looking argument, substituting judicial discretion for the statutory formula.[8]

The application of §105(a) to this case is inappropriate. Waxman cites to *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3rd Cir. 2003) in

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[8] Waxman's argument regarding "absurd results" is fully addressed in Petitioner's opening brief. Pet.Br. 48-55.

support of utilizing §105(a).[9] However, the Third Circuit's analysis is not helpful to Waxman's argument. *Id.* at 567. Section 105(a) is there cited for the proposition that equitable powers may be utilized to give effect to the policy of the legislature. That court used it to justify conferring derivative standing upon a creditors' committee to avoid fraudulent transfers. Here, neither the Code nor the legislative history of BAPCPA support Waxman's view of the statute, nor do they provide any support for the utilization of §105(a). The clear text of the statutes under consideration requires a mechanical application of the formula. Section 105(a) cannot be used as an excuse to substitute judicial discretion for the prescribed formula. *Marrama v. Citizens Bank of Massachusetts, et al.*, 549 U.S. 365, n.4 (2006) ("[W]hatever steps a bankruptcy court may take pursuant to §105(a) or its general equitable powers, a bankruptcy court cannot contravene provisions of the code.") Section 105(a) is not the wild card Waxman suggests.[10]

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[9] *Young v. United States*, 535 U.S. 43 (2002), also cited by Waxman, notably provides no analysis of §105(a), but does discuss, in a remote context, the equitable powers of the bankruptcy court.

[10] The Trustee agrees with Waxman in one important aspect – "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." Waxman Br. 28, *citing Norwest Bank Worthing v. Ahlers*, 485 U.S. 197, 206 (1988).

E. The Assertion That §1323 And §1329 Support The Forward-Looking Interpretation Of §1325 Is Textually And Historically In Error.

The United States notes §1323, a pre-BAPCPA Code section, which provides for pre-confirmation modification of plans. U.S.Br. 19. It asserts that this provision shows Congress intended for plans to reflect a debtor's actual circumstances, as opposed to utilization of the means test formulary at confirmation. In the next breath, however, it admits debtors are not exempt from the plan confirmation requirements of §1325. *Id.* The United States defeats its own argument. It properly concedes §1323 does not trump or modify §1325. Section 1323 only permits the debtor to move the 6-month look back period to confirmation, since it does not provide a mechanism for ignoring the formula. The provision does not, expressly or impliedly, support the suggestion that the formula may be dispensed with because of post-petition, pre-confirmation, changes in circumstances. Notably, no case is cited by the United States to support its thought in that regard. A debtor, faced with a pre-confirmation, post-petition income reduction, for example, could seek to amend the plan pursuant to §1323 and argue that the court should reset the 6-month look back period to account for the income changes, or even substitute a new income number in the Form 22C calculation. The text of §1323 just does not provide, directly or indirectly, a basis for resorting to judicial discretion if such a motion is filed. Indeed,

such a view would make no sense and is obviously not a result intended by Congress.

Similarly, the argument of Debtor and the United States that the existence of §1329 somehow supports their position is also textually flawed. Resp.Br. 23; U.S.Br. 19-20. Section 1329 has always permitted modification of a plan, but only after confirmation. Pet.App. 94; Pet.Br. 36, n.7. There is nothing in §1329 that suggests a court may throw out the means test formula *as it was used pre-confirmation.* While acknowledging §1329 permits a court to address post-confirmation changes in circumstances, they jump to the conclusion that the results of the formula are discarded. Resp.Br. 23; U.S.Br. 19. In making that conclusion, they assume that §1325(b)(1) cannot be utilized in the context of §1329. This may or may not be true; depending upon the jurisdiction, but that is not really the point.[11]

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[11] Interpretative disputes here predate BAPCPA. *See Freeman v. Schulman (In re Freeman),* 86 F.3d 478 (6th Cir. 1996) (Unexpected tax refunds must be applied to payments under the plan.); *but see, e.g., Forbes v. Forbes (In re Forbes),* 215 B.R. 183 (8th Cir. BAP 1997). (The disposable income test is not applicable to §1329 modifications.) The Fifth and Ninth Circuits have recognized that "projected" income is fact bound and changes in income should be addressed, post confirmation, by §1329. *Commercial Credit Corp. v. Killough (In re Killough),* 900 F.2d 61, 66 (5th Cir. 1990); *Anderson v. Satterlee (In re Anderson),* 21 F.3d 355 (9th Cir. 1994). *See also In re Sunahara,* 326 B.R. 768, 774-781 (9th Cir. BAP 2005) for a summary of cases addressing the issue of whether §1325(b)(1) is incorporated into §1329.

Debtor and the United States' analysis of §1329 ignore the *res judicata* effect of §1327. If the plan was confirmed based upon the means test formula, then changes in a debtor's financial position should be plugged into the formula to properly account for those circumstances. Disregarding the formula and resorting to Schedules I and J is not supported by the text of §1329, or, for that matter, any other section of the Code. The only way to set aside the formula is to set aside the confirmation order under §1330(a), which requires a finding that the order was procured by fraud. The parties are agreed that it makes no sense to have one set of standards for confirming a plan and different set for post-petition modifications. The Trustee's view of how §1329 should work is consistent with the rest of the statute. Regardless of whether §1329 is viewed as indirectly incorporating §1325(b)(1), it is counterintuitive to throw out the formula and revert to Schedules I and J. As one bankruptcy court put it:

> The court cannot allow this Debtor to adjust the entire formulaic budget upon which his modified plan was confirmed and return to Schedules I and J, based on one particular expense (the DSO). It is almost impossible for an above median family income debtor's disposable income to ever match the reality of his or her income and expenses at confirmation. Therefore, if a debtor could always modify his plan to incorporate his actual income and expenses post-confirmation, regardless of the narrowness of the reason

> asserted, the means test formula would have limited effect in Chapter 13.

In re Hill, 386 B.R. 670, 677 (S.D. Ohio 2008).

Debtor and the United States ignore the obvious for an above median income debtor. The court could simply substitute a new number into the formula for the one that has changed. In this manner, the formula would be honored and the debtor (or the trustee or allowed unsecured creditor) would get the benefit of the changes in circumstances.

II. Debtor's Choices Created Her Dilemma.

In all Debtor's protestations, which always end with her concluding that the mechanical approach causes anomalies, she ignores that *her choices* led to the unfavorable result.

Debtor first complains that the Trustee's view of her options gives rise to results not intended by Congress. She asserts that the mechanical approach invites abuse of the Chapter 13 system. Resp.Br. 25, 31. Her arguments are simply end runs around the options she did not exercise.

She also concludes that: "[B]ecause the trustee concedes that chapter 13's feasibility requirement would *forbid* the bankruptcy court from confirming a plan that failed to account for the fact that the non-recurring buyout Lanning received from Payless substantially inflated her 'current monthly income,' the lower courts properly calculated her 'projected'

disposable income."[12] Resp.Br. 15. Debtor erroneously contends she would not be "eligible" for Chapter 13 and that the Trustee conceded this point. Resp.Br. 9. She is wrong on both scores. Nowhere has the Trustee ever stated that Debtor would or could be "ineligible" for a Chapter 13. She has confused the meaning and import of the word "eligible."[13] This argument is flawed because the premise is incomplete. What she does not include in the equation is her failure to properly consider, let alone utilize, any of the four options. The real point is that she suggests bankruptcy court discretion should be permitted because her actual income was not before the bankruptcy court at confirmation. Only by ignoring the options not taken can she arrive at her incorrect conclusion.

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[12] Contrary to Debtor's assertion that feasibility is "[t]he hallmark" of a confirmable plan, that is only one factor out of many statutory requirements under §1322 and §1325. Resp.Br. 2.

[13] "Eligibility" is a term of art in §101, which is used in determining whether an individual or entity qualifies as a debtor. Resp.Br. 9. To illustrate, only an individual may be a debtor in Chapter 13 under §109(e). If an individual is not "eligible," the filing of the bankruptcy may be a nullity, even though eligibility is not jurisdictional. *E.g. In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006); *contra In re Racette*, 343 B.R. 200 (Bankr. E.D. Wis. 2006). A debtor whose plan is not feasible may still be "eligible" to be a debtor. Feasibility issues may be remedied by acquiring more income, reducing expenses, converting to another chapter, or pursuing other options, discussed *infra*.

A. Debtor Wrongly Dismisses Four Options Available To Her.

Debtor falls into the same trap as the courts below. The essence of the various formulations of her argument lack cogency, because the premise omits necessary considerations. She begins with the notion that the result in this case is wrong; therefore the mechanical plain reading view of the Chapter 13 means test is wrong. What is not included in the premise is that the results occurred, not because of the Chapter 13 means test, but because of her choices. She ignored the options available to her. Pet.Br. 48-55. Those options were:

- Delay the filing of the bankruptcy petition,
- Move the 6-month look back period, as specifically permitted by Congress in §101(10A)(A)(ii),
- Dismiss and refile,
- Convert to Chapter 7.

Contrary to Debtor's assertions, there is nothing "evasive" about any of these alternatives. Resp.Br. 32. Three of these options are hornbook considerations for any debtor lawyer; the other should be, if the Chapter 13 means test is properly viewed and applied.

1. Delay Of Filing Of The Bankruptcy Petition.

Debtor could have avoided this entire dispute by delaying the filing of her petition by less than two months. Resp.Br. 6-7.

Debtor cites *Neufeld* for the proposition that delaying the filing exposes the debtor to allegations of "fraud and dishonesty." Resp.Br. 33, *citing Neufeld v. Freeman*, 794 F.2d 149, 153 (4th Cir. 1986). *Neufeld* is very fact-driven, as are all bad faith cases. This analysis is not applicable to the facts of this case. Certainly, any debtor guilty of fraud, dishonesty or bad faith may be at risk. Here, however, Debtor's suggestion that she could actually expose herself to allegations of fraud or dishonesty is theoretically and factually inconsistent with her position in this matter, and the facts of this case, because all she would be doing is picking a time frame representative of her income. Resp.Br. 33.

The record is also devoid of any suggestion that this bankruptcy was filed under pressure of exigent circumstances, such as foreclosure, repossession or garnishment, as evidenced by Ms. Lanning's Statement of Affairs. J.A.29-44. Debtor controlled the date of filing, since she was not under duress. The significance of the timing of the filing is that the 6-month look back period under §101(10A) could have been a snapshot of a different time period more representative of her situation.

Any suggestion that debtors will not generally file upon a date advantageous to them cannot seriously be made.

> [T]he timing of filing the petition may determine whether a particular month puts the debtor over or under the median income safe harbor, or the amount that would create a presumption of abuse under the means test, or some other consequence. If a debtor's income has recently increased, waiting a few months would be preferable if no emergency requires an immediate filing.

Henry J. Sommer, *Consumer Bankruptcy Law and Practice* 366 (9th ed. 2009).

In addition to Henry Sommer's recommendations regarding the timing of the filing of the bankruptcy petition, the Hon. Keith M. Lundin, in his multi-volume treatise, *Chapter 13 Bankruptcy 3rd Edition*, suggests similar planning. "Debtors, with good advice from counsel, can control CMI . . . by the timing of filing . . . ," Keith M. Lundin, *Chapter 13 Bankruptcy 3rd Edition*, §468.1 (2007) (footnote omitted). Judge Lundin cites to *In re Beasley*, 342 B.R. 280, 282-85 (Bankr. C.D. Ill. 2006) ("[S]trict compliance with the definition of 'current monthly income' means that some debtors with high but irregular income may be able to avoid the imposition of the longer payment period by the timing of their filings, while debtors with lower incomes are forced to pay for five years. That may be unfair, but that is what the statute requires as it is currently written. *The remedy for*

that problem is legislative, not judicial.") (emphasis added).

It does not take much thought to imagine that the timing of any bankruptcy filing may be strategic, whether in a Chapter 13 context, or not. In a business case, for example, the filing may be after payroll has been made. Perhaps the filing is made immediately before or immediately after the preference period has run on a particular transaction. Any suggestion that timing of the filing of the bankruptcy is not a valid consideration ignores the realities of contemporary bankruptcy practice.

2. 6-Month Look Back – §101(10A).

Debtor also inexplicably ignores her ability to choose the disjunctive in the new "current monthly income" statute. §101(10A)(A)(ii). The statute works in this manner: "The 6-month period is defined as the six months ending on the last day of the month before the petition is filed, or, *if the debtor does not file Schedule I, the date the court determines current income.*" Henry J. Sommer, 366. (emphasis added).

Disregarding the import of the disjunctive nature of §101(10A) results in a flawed analysis and correspondingly incorrect conclusion regarding how the Chapter 13 means test mosaic fits together. Debtor's argument that moving (or even selecting) the 6-month look back period might be susceptible to abuse also ignores one very important fact – *the 6-month look back period and the ability to move it is a specific*

creature of statute.[14] The statute controls, as it is, for better or for worse, and not as Debtor and the United States wish it to be. *Lamie v. U.S. Trustee*, 540 U.S. at 542 (2004), *citing United States v. Ganderson*, 511 U.S. 39 (1994) (concurring opinion) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result"). Regardless of all other arguments, the existence and applicability of §101(10A)(A)(i) and (ii) simply cannot be disputed. Any result that walks around those two provisions does not follow the text of the statute, let alone its spirit.

3. Dismiss And Refile.

Debtor noted in her "Motion for Determination," that she might dismiss and refile, if not successful on the merits of her motion.[15] J.A.105. She now disowns that option. Apparently she claims that her own

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[14] As a contested matter, all interested parties would have an opportunity to conduct discovery, present evidence, and make argument before the court determined the applicable time frame. Fed.R.Bankr.P. 9014.

[15] The United States asserts and Debtor implies that this is an appeal from a confirmation order. U.S.Br. 7; Resp.Br. 10. They are incorrect. The appeal was from the Memorandum and Opinion of the bankruptcy court, which sustained the Trustee's objection to the Motion for Determination and denied confirmation. Pet.App. 54-82. The BAP entered an order on July 31, 2007, permitting the appeal to proceed on an interlocutory basis. J.A.15; 28 U.S.C. §158; 28 U.S.C. §1292(b); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764 (10th Cir. BAP 1997).

bankruptcy court pleading was suggesting a "means of evasion." Resp.Br. 33. In Debtor's defense, there is no statutory prohibition against this course of action. *See Johnson, infra. See also In re Murphy*, 375 B.R. 919, 923 (Bankr. M.D. Ga. 2007) (Debtor's dismissal of a prior case and refiling to avoid the special treatment of "910 claims" is not "bad faith.") Pet.Br. 53.

Congress obviously anticipated that the dismissal and refiling of a bankruptcy could be abusive. For example, §§362(c)(3) and (4) were added to the "relief from stay" statutes in the 2005 amendments. These new provisions condition the automatic stay for certain repeat filers. §§1325(a)(3) and (7) always require good faith in the filing of the petition and plan. Pet.Br. 55-56.

4. Conversion To Chapter 7.

Debtor contends she might be precluded from Chapter 7 relief. Although Debtor uses the word "might," she persists in perpetuating the same interpretative error made by the Tenth Circuit in asserting Ms. Lanning might not have qualified for Chapter 7 protection. Resp.Br. 28-29; Pet.App. 30. Their conclusion is completely wrong. In the Chapter 7 context, the debtor may obtain relief from the means test formula on *both* the income and expense sides. §707(b). *But, Congress did not incorporate the income portion of 707(b) into Chapter 13.* "Although section 707(b)(2)(B), referenced in section 1325(b)(3), allows for adjustment of income, section 1325(b)(3) speaks

only of 'amounts reasonably necessary to be expended.'" 8 *Collier on Bankruptcy* 1325.08[5][c] (15th ed. rev. 2009). The obvious importance of this omission is that while both an above median income Chapter 13 and Chapter 7 debtor may plead "special circumstances" on the expense side of the equation, as defined by §707(b)(2)(A) and (B), Congress did not permit the pleading of "special circumstances" on the income side in a Chapter 13. Instead, Congress provided that the 6-month look back period could be moved.

The record is silent as to the various and many reasons that could have, or did, lead Debtor to file under Chapter 13. No argument based on §707(b) supports any suggestion that Debtor could not have filed a Chapter 7 bankruptcy, rather than a Chapter 13. Resp.Br. 29; Pet.Br. 53. Debtor concedes as much, since she does not discuss the actual application of §707(b)(2)(B)(i)-(iv) to her circumstances.

5. Debtor Ignores Existing Bankruptcy Protections Against Debtor Abuse.

Debtor plays to a fear all likely have of any bankruptcy law – are abuses possible or likely? Debtor vaguely hints at what might occur, without support and, more importantly, without reference to the facts of this case. In some instances, her concerns simply ignore how the bankruptcy process actually works. Resp.Br. 31-32.

Debtor finds the results from a correct interpretation of the Chapter 13 means test "troubling." Resp.Br. 31. She fails to mention that in *Kagenveama*, to which she cites, it was the trustee, not the debtor, who supported the forward-looking approach, while the debtor argued the mechanical view. Resp.Br. 30; *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008). In that case, the mechanical results were pro-debtor, while here, the mechanical approach does not favor Ms. Lanning's position. Resp.Br. 30. Any suggestion that the resolution of this issue will routinely favor one constituency or another is simply incorrect. Regardless, the existence of deviations, one way or the other, does not give cause for these statutes to be judicially rewritten. The policy arguments made by the United States and Debtor are not those adopted by Congress. Any redrafting of the statutes should be done by the legislature, not the courts.

Moreover, inconsistent results on a nationwide scale will surely continue to multiply if Debtor's view is accepted. Instead of a predictable statute with fairly clear-cut results, the judicial discretion of several hundred bankruptcy judges will be substituted. *This* is exactly what Congress sought to prevent. *See* Sec. III, *infra*, regarding legislative history. If there are any gamesmanship opportunities here, they lie in forum shopping possibilities if the many variations of the forward-looking approach are permitted to survive. What the Trustee desires is

clarity – but in a manner that honors the text and spirit of the Chapter 13 means test.

Debtor's intimations that utilization of any of these options constitutes fraud or dishonesty are nothing more than scare tactics. She ignores the prior rulings of this Court. As in *Johnson*, Debtor "fails to apprehend the significance of the full range of Code provisions designed to protect Chapter 13 creditors." *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991). Inherent in any bankruptcy case is the right to pick not only the time of filing, but to file more than one bankruptcy.

> Congress has expressly prohibited various forms of serial filings. See, *e.g.*, 11 U.S.C. §109(g) (no filings within 180 days of dismissal); §727(a)(8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing); §727(a)(9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing). The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief. Cf. *United States v. Smith*, 499 U.S. 160, 167, 111 S.Ct. 1180, 1185, 113

> L.Ed.2d 134 (1991) (expressly enumerated exceptions presumed to be exclusive).

Id.[16]

As noted in response to Debtor's varied concerns respecting tactical filings, statutory remedies exist. §1325(a)(3) and (7) require that the petition and plan be filed in good faith. Although objections alleging bad faith are necessarily fact-oriented, many tools exist to assist trustees and creditors. These include testimony taken at the First Meeting of Creditors and examinations conducted pursuant to Fed.R.Bankr.P. 2004. Traditional discovery devices in the event an objection to confirmation or an adversary complaint is filed are also available.

Moreover, statutory protections exist for bad faith dismissals. Dismissing in bad faith is sanctionable under §349. *In re Frieouf*, 938 F.2d 1099, 1103 (10th Cir. 1991) (The bankruptcy court may, for cause, permanently, or for a specified length of time, disqualify from discharge debts scheduled in a dismissed case). Every circuit has a body of good faith/bad faith law, which can be applied to any of these options. In the Tenth Circuit, for example, *Flygare*

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[16] Debtor omits reference to Chapter 12 as one of the chapters under which individuals who qualify may file. Resp.Br. 2, n.1; §101(18)(A). Chapter 12, which is for "family farmers," is the most similar to Chapter 13, although the "means test" dispute is not implicated in Chapter 12.

remains the guiding light. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983); Pet.Br. 14, 47.

Statutory tools also exist to protect trustees and creditors from bad faith conversion. Pet.Br. 55-56. For example, §348(b)(2) expands the Chapter 7 estate to post-petition assets, if the debtor converted to Chapter 7 from Chapter 13 in bad faith. Section 1328 now contains additional protections, including the right to revoke a discharge if the same was procured through fraud. Section 1330 permits the revocation of an order of confirmation if such order was obtained by fraud.

In *Marrama*, this Court found that a Chapter 7 debtor forfeited his right to convert under §706 to Chapter 13, because of pre-petition bad faith conduct. *Marrama*, 549 U.S. 365 (2006), *supra*. This conduct, which included failure to disclose assets and transfers, would likely have warranted dismissal or reconversion of the case. *Id.* at 374. In reaching that result, the Court relied on several statutes, including §1307(c) (grounds for dismissal or conversion). *Id.* at 374. Section 105(a) was cited for the proposition that it could be used to prevent an abuse of process, as the statutory language suggests. *Id.* at 375, n.11.

Ultimately, Debtor and the United States casually shrug off these four options, as well as the protections available to guard against abuse, because they have not, and cannot, defend against them.

III. Debtor And The United States Wrongly Reject Pertinent Legislative History Because They Do Not Like The Result.

Debtor and the United States are dismissive of the legislative history developed by the Trustee. Resp.Br. 45. Direct quotes from this history can hardly be rejected out of hand. Pet.Br. 12, 28-29. Debtor and the United States simply choose to ignore the existing history because of the results they presume. Resp.Br. 45; U.S.Br. 23-24. Their brief forays into this area consist of wishing such history came from more people and was more recent.[17] Resp.Br. 46. The legislative history that *does* exist supports the conclusion that Congress intended to limit the discretion of bankruptcy judges. Debtor does not dispute, or even acknowledge, the importance of this history. Neither Debtor nor the United States brings anything of substance to the table to countermand that history. In noting that this history is 5 years prior to BAPCPA, Debtor and United States do not acknowledge that the law being considered at that time was identical to BAPCPA with respect to the propositions considered in this case. Neither the lapse of time nor the sources diminish its relevance. This Court's previous consideration of the legislative

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[17] Debtor references Senator Feingold's proposed amendment to BAPCPA in 2005, which was never voted on. It would have allowed adjustments for actual future income to modify "current monthly income." Resp.Br. 47 n.17. Perhaps Congress was pleased with the formula. That is just as likely as Debtor's speculation to the contrary.

history of bills not passed in order to divine congressional intent is not acknowledged by either the Debtor or the United States. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

The legislative history proves Congress intended:

1. To "[B]oth remove unequivocally the bankruptcy court's discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and *to restrict as much as possible reliance upon judicial discretion* to determine the debtor's ability to pay." Pet.Br. 28, *citing* 146 CONG. REC. S11,700 (2000) (Sen. Grassley) (emphasis added).

The plain language of the Chapter 13 means test is in clear accord with this stated intent. Only by ignoring §101(10A) and twisting the meaning and application of the word "projected" can Debtor defeat the statute and stated legislative intent to restrict judicial discretion.[18]

2. That "there be a uniform, nationwide standard to determine disposable income used in Chapter 13 cases based on means test calculations . . . (and that) *their disposable income be determined using*

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[18] Waxman's attempt to turn the phrase "as much as possible" into an argument supporting the forward-looking approach fails. Waxman Br. 22. If anything, it is simply recognition that completely eliminating judicial discretion is not possible. For example, §101(10A)(A)(ii) allows the court to move the 6-month period. That clearly involves limited discretionary acts, but does not suggest that the formula may be ignored.

basic means test concepts which define current monthly income (101(10A)) and allowable expenses (707(b)(2)(A)(ii), (iii) and (B))." Pet.Br. 29, *citing* 146 CONG. REC. S11,703 (2000) (Sen. Grassley) (emphasis added).

Debtor and the United States argue that the general statements in the legislative history noting Congress wanted debtors to pay the maximum they could afford somehow supports their argument that their expansive view of the Chapter 13 means test is consistent with legislative intent. Ms. Lanning and the United States are off mark on this specious proposition. While the general goal was, we all agree, to require debtors to pay all they can, what is missing from the opposition's analysis is that the methodology for accomplishing that end was, and is, an objective test – the means test, not substituted judicial discretion. Resp.Br. 31; U.S.Br. 21.

A plain reading of the statutes is confirmed by these telling snippets of legislative history. What debtors are to pay to creditors is to be determined from the statutory prescription and not by judicial invention. The concepts endorsed by the Tenth Circuit of "starting point," "presumptively correct," "substantial change in circumstances," and "presumption," do not exist in and are not supported by the text of the applicable statutes or the legislative history. Pet.App. 18, 24, and 31.

3. That "*Once net monthly income is determined, it is then multiplied by the applicable commitment*

period to determine the total amount which the plan must apply over its duration to pay unsecured creditors. If the plan does not apply all of disposable income to pay unsecured creditors, the plan is not confirmable." Pet.Br. 29, *citing* 146 CONG. REC. S11,703 (2000) (Sen. Grassley) (emphasis added).

Debtor goes to great lengths to try to escape what is undeniable – net monthly "disposable income" *must* be multiplied by the "applicable commitment period" to determine the amount to be paid to unsecured creditors. She fails in that endeavor, if for no other reason than she argues inconsistent positions. *See* Sec. I.B., *supra*. However, once again, neither the statute nor the legislative history supports her oblique, result-driven conclusion. Without doubt, debtor's "disposable income" *is* to be multiplied by the "applicable commitment period."

CONCLUSION

The legislative history and a fair and plain reading of the Chapter 13 means test support the Trustee's view. This case should be remanded to the bankruptcy court. Calculation of a debtor's "projected disposable income" must be done in accord with the statute, in the first instance. The new BAPCPA provisions allow no judicial discretion except in moving the 6-month look back period and in determining whether special circumstances exist on the expense side. A mandate that requires that the operative statutes be followed, as written, rather than re-written, should issue.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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(8)

No. 08-998

In the Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE, PETITIONER

v.

STEPHANIE KAY LANNING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Under Section 1325(b)(1)(B) of Title 11 of the United States Code, when a trustee or unsecured creditor objects to the confirmation of a debtor's Chapter 13 plan, the bankruptcy court can confirm that plan if "all of the debtor's projected disposable income to be received" during the plan period "will be applied to make payments to unsecured creditors under the plan." The debtor's "disposable income" is calculated by examining her monthly expenses when the Chapter 13 petition was filed and her average monthly income during the six-month period before the petition was filed. The question presented is as follows:

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

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In the Supreme Court of the United States

No. 08-998

JAN HAMILTON, CHAPTER 13 TRUSTEE, PETITIONER

v.

STEPHANIE KAY LANNING

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has a direct interest in the proper construction of Section 1325(b)(1)(B) of the Bankruptcy Code because United States Trustees—who are Department of Justice officials appointed by the Attorney General—supervise the administration of Chapter 13 cases and trustees, monitor Chapter 13 plans, and file comments with bankruptcy courts regarding such plans in connection with confirmation hearings pursuant to 11 U.S.C. 1324. See 28 U.S.C. 586(a)(3)(C); H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). Congress has provided that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding." 11 U.S.C. 307. At the Court's invitation,

the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Chapter 13 of the Bankruptcy Code provides for the adjustment of debts of an individual with regular income. 11 U.S.C. 1301 *et seq.* A debtor who files for bankruptcy under Chapter 13 retains possession of her assets, and she typically receives a discharge of her debts only after she pays her creditors under a plan confirmed by the bankruptcy court. 11 U.S.C. 1306(b), 1321 *et seq.*

If the trustee or an unsecured creditor objects to confirmation of a Chapter 13 debtor's plan, the court cannot confirm that plan

> unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. 1325(b)(1)(A)-(B). Thus, the bankruptcy court may confirm a contested Chapter 13 plan only if the debtor commits either to pay her unsecured creditors in full or to apply all of her "projected disposable income" during the plan period to paying those creditors.

b. This case concerns the proper method for calculating a debtor's "projected disposable income" during the plan period. Neither Section 1325 nor any other

provision of the Bankruptcy Code defines the term "projected disposable income." Section 1325 does, however, define the term "disposable income." That definition was recently amended as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act), Pub. L. No. 109-8, 119 Stat. 23. Because petitioner's arguments depend in large measure on that amendment, it is important to understand the statutory scheme both before and after BAPCPA's enactment.

i. Before BAPCPA became effective in October 2005, Section 1325 defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended" for the debtor's "maintenance or support," "charitable contributions," or "business * * * expenditures." 11 U.S.C. 1325(b)(2)(A)-(B) (2000). Then as now, a debtor listed her monthly income on Schedule I and her monthly expenditures on Schedule J. See Fed. R. Bankr. P. Official Form 6, Scheds. I-J (2000). Thus, to calculate a debtor's *current disposable income*, a bankruptcy court generally began with the monthly income listed on Schedule I and deducted any monthly expenditures listed on Schedule J that the court determined were reasonably necessary to support the debtor, to contribute to charity, or to operate the debtor's business.

Then, to calculate the debtor's *projected disposable income*, the court typically multiplied the debtor's current disposable income by the number of months in her plan. See, *e.g.*, *In re Killough*, 900 F.2d 61, 64 (5th Cir. 1990). In projecting disposable income, however, courts considered any changes to the debtor's income or expenses that appeared likely to occur during the plan period. See, *e.g.*, *In re Petro*, 395 B.R. 369, 377 (B.A.P.

6th Cir. 2008) ("Prior to BAPCPA the schedules were a starting point and courts gave meaning to the words 'projected' and 'to be received' by taking into account a debtor['s] anticipated future income."); *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W. Va. Jan. 23, 2008) ("Of course, under pre-BAPCPA law, bankruptcy courts sometimes deviated from the debtor's income and expenses listed on Schedules I & J based on known increases or decreases in either income or expenses.").

ii. In BAPCPA, Congress amended the definition of "disposable income." Section 1325 now defines that term as "current monthly income received by the debtor * * * less amounts reasonably necessary to be expended" for certain items. 11 U.S.C. 1325(b)(2). "[C]urrent monthly income" is defined, in turn, as the debtor's "average monthly income from all sources" during the six months preceding the filing. 11 U.S.C. 101(10A)(A)(i). Although a debtor is still required to file Schedules I and J, now she must also file Official Form 22C, on which she calculates her current monthly income as defined in Section 101(10A)(A)(i). See Fed. R. Bankr. P. Official Form 22C (2009); Pet. Supp. App. 1-8.[1] Thus, to calculate a debtor's monthly income under BAPCPA, a court no longer focuses on a single month's income at the time of filing; rather, it considers a historical average of the debtor's income during the six-month period before commencement of the case.

In addition to changing the method of calculating all debtors' monthly income, BAPCPA also changed the

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[1] Form B22C was an interim form that subsequently became Official Form 22C. Pet. App. 39. Respondent completed Form B22C, *ibid.*, but the Forms are virtually identical and they are referred to interchangeably herein.

method of calculating some debtors' monthly expenses. If a debtor's current monthly income is below the median income of a comparably-sized household in her State, the debtor may claim the same types of general expenses—*i.e.*, "maintenance or support" obligations, "charitable contributions," and "business * * * expenditures"—as she could before BAPCPA. 11 U.S.C. 1325(b)(2)(A)(i)-(ii) and (b)(2)(B). But if a debtor's current monthly income is above-median, she may claim only particular kinds of expenses in amounts specified under Section 707(b)(2) of the Bankruptcy Code. 11 U.S.C. 1325(b)(3)(A) (incorporating 11 U.S.C. 707(b)(2)).

Thus, BAPCPA amended the formulae for computing "disposable income" under Section 1325(b)(2) in two respects: it altered the manner in which a debtor's current income is determined, and it established a new method of calculating an above-median debtor's expenses. The Act did not, however, address the method a court should employ to calculate "projected disposable income" under Section 1325(b)(1)(B). See Pet. App. 50-51 ("BAPCPA linked 'disposable income' to Form B22C current monthly income, which is a historically based figure, but it left 'projected disposable income,' which had an established pre-BAPCPA treatment, alone."). Accordingly, the specific question presented in this case is whether, in projecting disposable income, courts should consider anticipated changes to the debtor's financial circumstances, just as they did before BAPCPA.

2. Respondent is a single woman with no children who resides in Kansas. On October 16, 2006, she filed a Chapter 13 petition to address $36,793.36 in unsecured debt. During the six-month period that preceded her filing, respondent received a one-time buyout from her

former employer that increased her monthly gross income to $11,990.03 in April 2006 and $15,356.42 in May 2006. When respondent averaged her monthly income for April through September 2006 on Form 22C, her current monthly income amounted to $5,343.70. Because that figure placed her above the median income for a family of one in Kansas, she calculated her expenses in accordance with Section 707(b)(2) of the Bankruptcy Code. Respondent's monthly expenses totaled $4,228.71, leaving her with monthly disposable income of $1,114.98 on her Form 22C. Pet. App. 4-5.

As a result of the buyout payments respondent received, however, the "current monthly income" stated on her Form 22C was substantially greater than the monthly income that she could reasonably expect to earn during the plan period. On her Schedule I, she listed a monthly net income from new employment of $1,922, which placed her considerably below the state median income level. On her Schedule J, she listed actual monthly expenses of $1,772.97, leaving her with monthly disposable income of $149.03. Based on that figure, respondent proposed a repayment plan of $144 per month for 36 months, or a total of $5,184. Pet. App. 4, 57.

Petitioner, the bankruptcy trustee, objected to confirmation of the plan. He argued that, because respondent's monthly disposable income on her Form 22C was $1,114.98, the plan did not satisfy Section 1325(b)(1)(B)'s requirement that "all of the debtor's projected disposable income to be received" in the plan period must "be applied to make payments to unsecured creditors." Petitioner contended that respondent's "projected disposable income" during the plan period was simply her monthly "disposable income" ($1,114.98) derived from the pre-plan figures, multiplied by the number of

months in her plan (36), for a total "projected disposable income" of $40,139.28. Petitioner therefore proposed that the plan provide for monthly payments of $756, which would have repaid respondent's unsecured creditors in full over the life of the plan. Petitioner acknowledged, however, that respondent did not have the means to fund such a plan. Pet. App. 5-7.

3. a. Over petitioner's objection, the bankruptcy court confirmed the plan essentially as proposed by respondent. Pet. App. 54-82.[2] The court reasoned that "Congress' reference in § 1325(b)(1)(B) to *projected* disposable income *to be received* in the applicable commitment period would be superfluous if the historical average was the start and end of the equation." *Id.* at 69. The court further explained that Section 1325(b)(1)(B) requires a "determination whether the debtor is committing all of his or her projected disposable income 'as of the effective date of the plan,'" not as of the date of the petition. *Id.* at 70 (emphasis omitted). The court also concluded that petitioner's approach would "lead[] to absurd results that are at odds with both congressional purpose and common sense" because it would prevent debtors whose "incomes drop[] significantly from their pre-petition monthly average * * * from ever being able to file a feasible and confirmable Chapter 13 repayment plan." *Id.* at 70-71. The bankruptcy court therefore "agree[d] with the majority of courts, which have found that the term 'projected' is a forward-looking concept" that allows consideration of "any reasonably antic-

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[2] The bankruptcy court ordered that respondent's plan run for 60 months rather than the 36 months that respondent had proposed. Pet. App. 76-80. Respondent did not challenge that aspect of the bankruptcy court's decision, see *id.* at 11-12 & n.4, and it is not at issue in this Court.

ipated changes in [disposable] income during the life of the proposed Chapter 13 plan." *Id.* at 69.

b. The bankruptcy appellate panel affirmed. Pet. App. 33-53. After describing an existing split in authority on the question, *id.* at 44-50, the panel reasoned that, although "BAPCPA linked 'disposable income' to Form B22C current monthly income, which is a historically based figure, * * * it left 'projected disposable income,' which had an established pre-BAPCPA treatment, alone." *Id.* at 50-51. Before BAPCPA's enactment, the panel explained, if bankruptcy courts "had reason to believe that [a debtor's] schedules did not accurately predict a debtor's actual ability to pay, other evidence was also considered." *Id.* at 51. The panel therefore concluded that, although BAPCPA had modified the formulae for calculating a debtor's current disposable income, it had not "eliminate[d] the bankruptcy courts' discretion" to consider anticipated changes to a debtor's financial condition "where significant circumstances support doing so." *Ibid.*

c. The court of appeals affirmed. Pet. App. 1-32. After likewise surveying the split in authority on the question, *id.* at 16-23, the court concluded that petitioner's "mechanical approach"—multiplying a debtor's current monthly "disposable income" by the number of months in her plan—is not consistent with the statutory text. *Id.* at 24-25. The court relied in particular on Section 1325(b)(1)(B)'s directive that, "as of the effective date of the plan," all of the debtor's projected disposable income "to be received" during the plan period "will be applied to make payments to unsecured creditors." *Id.* at 25 (emphasis omitted). The court construed those three statutory phrases to "suggest[] consideration of the debtor's actual financial circumstances as of the ef-

fective date of the plan." *Ibid.* The court of appeals further concluded that the language of Form 22C and BAPCPA's legislative history confirmed Congress's intent that courts utilize a "forward-looking approach." *Id.* at 28-29. The court finally noted that the mechanical approach would foreclose bankruptcy relief for debtors like respondent whose post-filing income decreases, while allowing debtors whose post-filing income increases to avoid paying creditors all that they are able. *Id.* at 31.

SUMMARY OF ARGUMENT

In crafting Chapter 13 of the Bankruptcy Code, Congress intended to create an orderly system that permits honest debtors to be released from crushing debt by repaying their creditors as much as they can afford over the life of the bankruptcy. That intent is apparent in Section 1325(b)(1)(B), which, upon objection by the trustee or a creditor, conditions the confirmation of a Chapter 13 plan on the bankruptcy court's determination that the debtor will either repay her unsecured creditors in full or devote all of her "projected disposable income" to such repayment for the duration of the plan. Although Congress defined the term "disposable income" in Section 1325, it did not define the word "projected" or the entire phrase "projected disposable income." The ordinary meaning of the word "projected," however, indicates that Congress intended bankruptcy courts to consider the debtor's actual financial circumstances and any changes to those circumstances that the court knows are likely to occur in the future, rather than relying only on financial data that may no longer reflect a debtor's income and expenses.

This approach is also faithful to the remainder of Section 1325, which requires courts to project the disposable income that "will be received" by the debtor and "will be applied to make payments to unsecured creditors." 11 U.S.C. 1325(b)(1)(B). Under petitioner's mechanical view of the term "projected"—according to which a court must simply multiply a debtor's "disposable income" by the number of months in her plan—debtors such as respondent must commit to paying money they will never receive and never apply to repay creditors. That is not a natural reading of the term "projected disposable income," and it is inconsistent as well with the rest of Chapter 13, which evinces Congress's intent that the implementation of a Chapter 13 plan be grounded in a debtor's actual financial circumstances rather than tied to historical data that no longer reflect the debtor's real-life situation.

Before Congress amended the Bankruptcy Code in 2005, bankruptcy courts used the disposable income derived from the information reported on a debtor's Schedules I and J as the starting point for determining the debtor's projected disposable income. If that figure accurately reflected the debtor's financial situation at the time of confirmation and was likely to reflect the debtor's financial situation over the life of the plan, a court would merely multiply the disposable income by the number of months in the plan. But when the debtor's financial situation had changed between the time of filing and the time of confirmation, or when it was likely to change during the life of the plan, bankruptcy courts would take such changes into account in projecting the debtor's disposable income. Nothing in BAPCPA suggests that Congress intended to alter that approach. Courts therefore should continue to "project[]" a debt-

or's disposable income using the same method they did before BAPCPA.

Petitioner acknowledges that his reading of the statute produces unfair results for some debtors who will be shut out of the bankruptcy system, and that it produces unfair results for some creditors who will receive little or no repayment from debtors who can afford to satisfy their obligations. Under the approach employed by the court of appeals, by contrast, neither debtors nor creditors fall prey to unfair and illogical results. Petitioner suggests that a debtor may avoid the harsh effects of the mechanical approach by strategically delaying the filing of a petition, dismissing a petition and then refiling at a later date, ignoring the requirement that a debtor file a Schedule I, or attempting to file under Chapter 7 instead of under Chapter 13. This Court should not construe the term "projected disposable income" in a way that encourages gamesmanship, requires a debtor to risk his ability to enjoy the protections of bankruptcy, or otherwise undermines the intent of Congress.

ARGUMENT

IN PROJECTING A CHAPTER 13 DEBTOR'S DISPOSABLE INCOME UNDER SECTION 1325(b)(1)(B), COURTS SHOULD CONSIDER EVIDENCE INDICATING THAT THE DEBTOR'S FINANCIAL CIRCUMSTANCES HAVE CHANGED OR ARE LIKELY TO CHANGE DURING THE PLAN PERIOD

As this Court has long recognized, the twin goals at the core of the federal bankruptcy system are giving the honest but unfortunate debtor a fresh start and ensuring the maximum possible equitable distribution to creditors. See, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918); *Williams* v. *United States Fid. & Guar. Co.*, 236 U.S. 549 (1915). Petitioner's reading of Section

1325(b)(1)(B) would frustrate both of those objectives. Some honest debtors in need of relief under Chapter 13 will be shut out of the system. And some creditors will be foreclosed from obtaining satisfaction of debts from debtors who can afford to repay them. The text of Section 1325(b)(1)(B), along with the structure, history, and purposes of that provision, indicates that a bankruptcy court's calculation of a debtor's "projected disposable income" should take into account evidence indicating that the debtor's income or expenses during the plan period are likely to be different from her pre-petition income or her expenses at the time of filing.

A. The Text Of Section 1325 Makes Clear That A Court Should Rely On A Debtor's Actual Financial Circumstances Rather Than Only On Historical Income Figures

1. Under Chapter 13 of the Bankruptcy Code, a debtor is required to submit a plan for repaying her unsecured creditors that is consistent with the requirements of 11 U.S.C. 1322. When either a creditor or the Chapter 13 trustee objects to such a plan, the bankruptcy court may confirm it only if the debtor either will repay all of her unsecured creditors in full or will devote all of her "projected disposable income" toward repayment of her creditors over the life of the plan. 11 U.S.C. 1325(b)(1)(B). Although Section 1325 defines the term "disposable income," it does not define the term "projected disposable income" or specify a method for calculating how a debtor's current "disposable income" should be "projected" into the future. The Court must therefore look to the common and ordinary meaning of the term "projected." See *Rousey* v. *Jacoway*, 544 U.S. 320, 330 (2005). That adjective is derived from the verb "project," which ordinarily means "[t]o calculate, esti-

mate, or predict (something in the future), based on present data or trends." *In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006) (quoting *American Heritage College Dictionary* 1115 (4th ed. 2002)); see *Merriam-Webster Collegiate Dictionary* 993 (11th ed. 2005) (defining the verb "project" as "to plan, figure, or estimate for the future," and the noun "projection" as "an estimate of future possibilities based on a current trend"); *The New Oxford American Dictionary* 1355 (2d ed. 2005) (defining the verb "project" as "[to] estimate or forecast (something) on the basis of present trends").

Consistent with that usual understanding of the term "projected," bankruptcy courts should determine a debtor's "projected disposable income" by forecasting whether current trends are reasonably likely to continue—*i.e.*, whether a debtor can reasonably expect to receive the same income and incur the same expenses during the plan period as prior to the filing of her bankruptcy petition. See *In re Nowlin*, 576 F.3d 258, 263 (5th Cir. 2009) ("[W]e interpret the phrase 'projected disposable income' to embrace a forward-looking view grounded in the present via the statutory definition of 'disposable income' premised on historical data."); 8 *Collier on Bankruptcy* ¶ 1325.08[5][a] at 1325-61 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) (*Collier*) ("To the extent that courts give any meaning to the word 'projected,' and courts are supposed to give meaning to every word in a statute, they may have to disregard the debtor's prior income if circumstances have changed."). Petitioner and his amicus contend (Pet. Br. 41; NACBA Am. Br. 17-18) that the bankruptcy court must calculate "projected disposable income" by simply multiplying the debtor's historically-based "disposable income" by the number of months in the plan.

But "[t]he word 'multiplied' is quite different from the word 'projected,'" *In re Kibbe*, 361 B.R. 302, 312 n.9 (B.A.P. 1st Cir. 2007), and other provisions of the Bankruptcy Code expressly require the mechanical calculation that petitioner advocates here. See, *e.g.*, 11 U.S.C. 1325(b)(3) (providing that debtor's current monthly income be "multiplied by 12" to determine whether debtor has above-median income).[3] Congress's decision to require projection rather than multiplication in Section 1325(b)(1)(B) indicates that it did not intend future disposable income to be mechanically derived from current disposable income.

Contrary to petitioner's assertion (Pet. Br. 41), the court of appeals' forward-looking approach does not leave Section 1325's definition of "disposable income" with "no apparent purpose." That definition continues to serve the same two important purposes that the prior definition of that term served before BAPCPA was enacted. First, it directs the bankruptcy court's calculation of disposable income, now by further specifying the types of revenue that the debtor must treat as income, and the types of expenses that an above-median debtor may claim as reasonable and necessary. See Pet. App. 27. Although the process by which a debtor's future income is "projected" may involve predictive judgments

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[3] See also 11 U.S.C. 1325(b)(4)(A)(ii) (providing that debtor's current monthly income be "multiplied by 12" to determine whether debtor has above-median income); 11 U.S.C. 704(b)(2) (same); see also 11 U.S.C 707(b)(2)(A)(i) (providing that debtor's current monthly income be "multiplied by 60" to determine in part whether presumption of abuse applies); 11 U.S.C. 1322(d)(1)-(2) (providing that debtor's current monthly income be "multiplied by 12" to determine length of plan); 11 U.S.C. 1326(b)(3)(B)(ii) (providing that certain payments be "multiplied by 5 percent" to determine trustee compensation).

rather than simple multiplication, those predictive judgments must focus on the types of revenue and expenses that are included in Section 1325's definition of "disposable income." By contrast, if the term "disposable income" were undefined, bankruptcy courts would need to determine which types of revenue and expenses should be considered. The statutory definition thus constrains the bankruptcy courts' discretion in calculating "projected disposable income," even though it does not reduce that calculation to a mathematical formula.

Second, as a practical matter, Section 1325's definition of "disposable income" will often control what a debtor must contribute to a Chapter 13 plan in order to receive confirmation. In many cases, a court may reasonably expect that a debtor's monthly income will be the same during the plan period as it was during the six months before she filed her petition, and that her expenses will be the same during the plan period as at the time of filing. In those cases, projecting the debtor's disposable income will require nothing more than multiplying her current disposable income by the number of months in her plan. But when the evidence indicates that the debtor's current income or expenses are likely to change during the plan period—or that they have already changed during the interval between the filing of the petition and the time of plan confirmation—"a debtor's 'disposable income' calculation on Form 22C is a starting point for determining the debtor's 'projected disposable income,'" and "the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances." *In re Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008), cert. denied, 129 S. Ct. 1630 (2009).

2. Petitioner contends (Pet. Br. 40) that the Court should "adopt a reading [of Section 1325] that does not treat statutory terms as mere surplusage." Petitioner's own construction of the term "projected disposable income," however, would render much of Section 1325(b)(1)(B) meaningless. Section 1325(b)(1)(B) requires the bankruptcy court to ensure, upon objection by the trustee or a creditor, that all of a debtor's "projected disposable income *to be received* in the applicable commitment period * * * *will be applied* to make payments to unsecured creditors." 11 U.S.C. 1325(b)(1)(B) (emphases added). By referring to "projected disposable income" that will "be received" and "be applied to make payments" during the plan period, Section 1325(b)(1)(B) "links 'projected disposable income' with the debtor's income actually received during the plan, and indicates a forward-looking orientation of the phrase." *In re Nowlin*, 576 F.3d at 263. Under petitioner's mechanical interpretation of the term "projected," however, the bankruptcy court is precluded from considering either the amount of income a debtor is actually likely to receive over the duration of her plan or the amount of such income she will be able to apply in that period to make payments to her creditors.

Application of petitioner's interpretation to the facts of this case illustrates its inconsistency with the overall thrust of Section 1325(b)(1)(B). Under petitioner's mechanical view, respondent's "projected disposable income" is $1,114.98 per month, even though petitioner concedes that respondent's actual disposable income during the plan period will be only $149.03 per month. See Pet. App. 4-6. Petitioner would make confirmation of the plan contingent on respondent's commitment to pay $756 per month, even though nearly $607 of that

amount will never "be received" and thus will never "be applied to make payments" during the plan period. In short, petitioner's proposed plan would require respondent to commit to repay creditors with income that she will never receive. That is not a natural reading of the statutory text.

Under Section 1325(b)(1)(B), a plan must also commit that, "as of the effective date of the plan," all of the debtor's projected disposable income will be applied to repayment of unsecured creditors. Because a Chapter 13 plan is not binding on the debtor and other parties until it is confirmed, 11 U.S.C. 1327(a), "the effective date of the plan" is the date on which the plan is confirmed by the bankruptcy court. The requirement that bankruptcy courts determine a debtor's projected disposable income at the time of confirmation, which often occurs months after the time of filing, further indicates that Congress intended to allow for "consideration of evidence at the time of the plan's confirmation that may alter the historical calculation of disposable income on Form 22C." *In re Nowlin*, 576 F.3d at 263; see Pet. App. 25. By contrast, petitioner's mechanical approach would preclude the bankruptcy court from considering not only changes in the debtor's financial circumstances that are demonstrably likely to occur during the plan period, but even changes that have already occurred between the pre-filing period and the date the confirmation decision is made.

Section 1325 also provides that, as a condition of confirmation, a court must determine that "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. 1325(a)(6); see pp. 26-28, *infra*. To make that determination, the court necessarily must assess the debtor's likely future financial cir-

cumstances. There is no reason that Congress would require such a forward-looking inquiry in one subsection of Section 1325 and prohibit it in another.

3. Petitioner and his amicus observe (Pet. Br. 45-56; NACBA Am. Br. 19-20) that Section 1325(b)(3) (through the incorporation of Section 707(b)(2)(A)) expressly allows courts to adjust an above-median debtor's expenses upon a showing of special circumstances. They argue that Congress's failure expressly to authorize similar adjustments on the income side of the ledger reflects an intent to limit the courts' discretion in this regard, and that the court of appeals' decision disserves that congressional intent. That argument is misconceived.

Under Sections 1325(b)(3) and 707(b)(2)(A), a court's adjustment of an above-median-income debtor's expenses due to special circumstances takes place in the calculation of the debtor's "disposable income." The absence of any similar "special circumstances" exception to the statutory definition of "current monthly income," see 11 U.S.C. 101(10A)(A)(i), means that the court must use historical income data to calculate a debtor's "disposable income" under Section 1325(b)(2). The question in this case, however, is how a court should "project[]" a debtor's disposable income over the life of her bankruptcy plan so as to ensure that all of the income "to be received" in that time "will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. 1325(b)(1)(B). Sections 1325(b)(3) and 707(b)(2)(A) have no bearing on the proper resolution of that issue.

B. Other Provisions In Chapter 13 Of The Bankruptcy Code Confirm That Section 1325 Mandates A Forward-Looking Approach That Reflects A Debtor's Actual Financial Circumstances

The proper interpretation of particular statutory provisions turns not only on "the language itself [and] the specific context in which that language is used," but also on "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). The broader statutory context confirms that Congress intended a Chapter 13 debtor's plan to reflect the reality of her circumstances, even when those circumstances change over time. To that end, Congress included two provisions expressly permitting the modification of a debtor's initial plan.

The first, 11 U.S.C. 1323, allows a debtor to modify her plan "at any time before confirmation." A debtor may modify her proposed plan for many reasons, including to cure an objection that the trustee or a creditor has raised, to cure a post-petition arrearage in mortgage payments, or to accommodate "a change in circumstances making it impossible for the debtor to carry out the terms of the original, or prior, plan." 8 *Collier* ¶ 1323.02, at 1323-2 to 1323-3. To be sure, a debtor's pre-confirmation modification of her plan does not exempt her from complying with the requirements of Section 1325. But the flexibility built into the development of a confirmable Chapter 13 plan is evidence of Congress's intent that such plans reflect a debtor's actual ability to repay her creditors.

The second provision, 11 U.S.C. 1329, permits the debtor, trustee, or any unsecured creditor to seek modification of a Chapter 13 plan "[a]t any time after confirmation of the plan." This provision, too, reflects Con-

gress's recognition that a debtor's financial circumstances may change in ways that will alter her ability to repay her creditors. Congress's decision to allow a debtor, creditor, or trustee to seek post-confirmation modification reflects Congress's understanding that changes in circumstances can either hamper a debtor's ability to comply with her plan or enhance her ability to satisfy her unsecured debts. Although Section 1329 does not govern the standards a bankruptcy court must employ in deciding whether to confirm a plan under Section 1325(b)(1)(B), it is further evidence that Congress expected the Chapter 13 system to operate in a realistic manner that takes account of a debtor's actual financial circumstances. If the bankruptcy court may modify a Chapter 13 plan *after* confirmation to take account of changes in a debtor's income or expenses, it would make little sense to preclude the court, in determining whether that plan should be confirmed, from taking account of changes in the debtor's financial circumstances that have occurred between the pre-filing period and the time of plan confirmation.[4]

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[4] Under Section 1327 of the Bankruptcy Code, "[t]he provisions of a confirmed plan bind the debtor and each creditor." 11 U.S.C. 1327(a). Some courts of appeals have held that, under Section 1327, the confirmation of a plan has a *res judicata* effect such that parties may not seek post-confirmation alteration of a plan to take into account circumstances known or reasonably foreseeable at the time of confirmation. See *In re Dorsey*, 505 F.3d 395, 398-399 (5th Cir. 2007); *In re Murphy*, 474 F.3d 143, 149-150 (4th Cir. 2007); but see *Barbosa* v. *Solomon*, 235 F.3d 31, 38-41 (1st Cir. 2000); *In re Witkowski*, 16 F.3d 739, 743-746 (7th Cir. 1994). Under that view of Section 1327, adoption of petitioner's rule would mean that parties affected by a Chapter 13 bankruptcy are *never* permitted to take into account changes in a debtor's financial circumstances that occur prior to confirmation but are not reflected in the six-

C. BAPCPA's History And Purposes Confirm That Section 1325 Mandates A Forward-Looking Approach To The Calculation Of "Projected Disposable Income"

1. The legislative history that accompanied BAPCPA is not extensive, but the House Judiciary Report explains that BAPCPA "[was] intended to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*2005 House Report*). Although in this case petitioner's mechanical approach would have required respondent to commit to make payments well in excess of the funds that would actually be available to her, in other cases that same approach would allow debtors to pay less than they could afford. See *In re Kagenveama*, 541 F.3d 868, 871 (9th Cir. 2008) (affirming confirmation of plan pursuant to which debtor would pay less than her actual future disposable income); see also *In re Turner*, 574 F.3d 349, 355-356 (7th Cir. 2009) (reversing plan that would allow debtor to deduct amount for expense he would not actually incur during plan). When a debtor's pre-filing disposable income understates the resources that are likely to be available to her during the plan period (*e.g.*, because of a temporary decrease in income during the pre-filing period or an increase in expenses at the time of filing), mechanically extrapolating that net income figure into the future would deprive creditors of payments that the debtor would be able to make during the plan period. That result is inconsistent with Congress's intent "that debtors pay the greatest amount within their capabilities. Nothing more; nothing less." *In re Kibbe*, 361 B.R. at 314.

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month look-back period utilized in the calculation of a debtor's "disposable income."

2. Before BAPCPA's enactment, bankruptcy courts "usually" multiplied a debtor's disposable income by the number of months in the plan to determine his projected disposable income, *e.g.*, *Anderson* v. *Satterlee*, 21 F.3d 355, 357 (9th Cir. 1994), but they departed from that mathematical calculation when necessary to take into account anticipated changes to a debtor's financial circumstances, see, *e.g.*, *In re Petro*, 395 B.R. 369, 377 (B.A.P. 6th Cir. 2008) ("Prior to BAPCPA the schedules were a starting point and courts gave meaning to the words 'projected' and 'to be received' by taking into account a debtor['s] anticipated future income.").[5] Indeed, Schedules I and J, which courts used as the starting point for determining a debtor's disposable income, required (and continue to require) debtors to note when "any increase or decrease" in income or expense is "reasonably anticipated within the year following the filing" of the relevant schedule. Fed. R. Bankr. P. Official Form 6, Scheds. I-J (2000).

Congress is presumed to be familiar with the backdrop against which it acts. See, *e.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988); *Cannon* v.

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[5] See also, *e.g.*, *In re Simms*, No. 06-1206, 2008 WL 217174, at *9 (Bankr. N.D. W. Va. Jan. 23, 2008) ("Of course, under pre-BAPCPA law, bankruptcy courts sometimes deviated from the debtor's income and expenses listed on Schedules I & J based on known increases or decreases in either income or expenses."); *In re Richardson*, 283 B.R. 783, 799 (Bankr. D. Kan. 2002) ("Before a plan is confirmed, the debtor, the trustee, and the court must look to see what the plan offers in payments from projected disposable income that will predictably flow to the debtor. If income is foreseeable at confirmation, it is included within projected disposable income."); Thomas J. Izzo, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 Emory Bankr. Devs. J. 521, 552 (2009).

University of Chicago, 441 U.S. 677, 696-697 (1979). For that reason, this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990)). Although BAPCPA modified the formulae used to calculate a debtor's "disposable income," it did not address the manner in which the debtor's income is "projected" into the future. See pp. 4-6, *supra*. Accordingly, bankruptcy courts should employ the same approach they employed prior to 2005 by starting with the disposable income figure from Form 22C and multiplying that by the number of months in a debtor's plan—*unless* there is reason to believe that the debtor's financial circumstances have changed or will change, in which case the court should project the debtor's likely disposable income over the life of the plan. If Congress had intended to preclude bankruptcy courts from continuing to consider debtors' likely future financial circumstances when determining projected disposable income, "one would expect Congress to have made unmistakably clear its intent." *Cohen*, 523 U.S. at 222.

3. Petitioner contends that adopting his interpretation of the term "projected disposable income" will further Congress's efforts to reduce bankruptcy courts' discretion in determining debtors' ability to repay their creditors. Petitioner bases his argument on statements from one member of Congress related to a bankruptcy reform bill that was introduced, but never enacted, five years before Congress passed BAPCPA. See Pet. Br. 28-29 (relying on statements of Senator Grassley, 146 Cong. Rec. S11,700 and S11,703 (daily ed. Dec. 7, 2000)).

Although the statement of one Senator about a bill that was never enacted is of dubious value in interpreting a federal statute, it is apparent from the 2005 amendments that Congress did intend to curtail the discretion of bankruptcy judges in certain respects. Prior to BAPCPA, individual judges had greater latitude to determine which sources of revenue to count as income and which expenses to consider reasonably necessary. In exercising that discretion, different judges sometimes employed different criteria, so that two debtors with identical financial circumstances might be required to pay different amounts to their creditors. For example, courts differed as to whether to treat property that is exempt under Section 522(c) of the Bankruptcy Code as income under the former version of Section 1325, see *In re Hunton*, 253 B.R. 580, 581-582 (Bankr. N.D. Ga. 2000) (collecting cases), and about whether to allow school tuition to be deducted as a reasonable expense, *In re Burgos*, 248 B.R. 446, 450 (Bankr. M.D. Fla. 2000) (collecting cases).

When Congress amended the Code in 2005, it curtailed that type of discretion by delineating the types of revenue that should be counted as "income" and the types of expenses that may be counted as reasonably necessary for above-median debtors. But Congress did not require courts to rely on a debtor's historical financial data when that information does not accurately reflect the debtor's likely resources during the period covered by her bankruptcy plan.[6] Rather, Congress left

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[6] *E.g.*, *In re Turner*, 574 F.3d at 355 ("Since the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes them as possible, we cannot see the merit in throwing out undisputed information, bearing on how much the debt-

unchanged the term "projected disposable income," which had previously been understood to allow consideration of a debtor's likely financial circumstances during the plan period. Congress also left intact other features of the statutory scheme (*e.g.*, Section 1325(b)(1)(B)'s reference to income "to be received" during the plan period) that direct the bankruptcy court to consider the debtor's actual ability to pay. See pp. 16-18, *supra*. Congress's decision to preclude bankruptcy courts from exercising one form of discretion does not mean Congress wanted to preclude bankruptcy courts from exercising other forms of discretion, provided in separate, unamended statutory language.

For essentially the same reason, petitioner's argument is not advanced by his assertion (Br. 34) that Chapter 13 trustees "warned" Congress that "strict use of the Form 22C formula would lead to anomalous results in some cases, namely that above median income debtors might pay less than they would prior to BAPCPA." Here too, the change in the law to which petitioner refers has nothing to do with the manner in which disposable income is "projected." Rather, petitioner again refers to BAPCPA's establishment of new and more determinate formulae for calculating *current* disposable income (*i.e.*, disposable income during the six-month pre-filing period). Some Chapter 13 trustees appear to have expressed concern prior to BAPCPA's enactment that the new formulae would often produce lower disposable-income figures for above-median debtors (and thus require such debtors to pay less to their creditors) than the prior, more discretionary regime.

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or can afford to pay, that comes to light between the submission and approval of a plan of reorganization.").

See *In re Alexander*, 344 B.R. 742, 746-747 (Bankr. E.D.N.C. 2006). Petitioner argues that Congress was aware of such concerns and nonetheless precluded judges from exercising discretion in calculating current disposable income. But once again, petitioner cites no evidence suggesting that Congress intended to preclude (or that Chapter 13 trustees generally understood BAPCPA to preclude) bankruptcy courts from considering likely changes in a debtor's financial circumstances in calculating *projected* disposable income.

D. Petitioner's Mechanical Approach To Determining A Debtor's Projected Disposable Income Would Undermine The Purposes Of The Chapter 13 Bankruptcy System

Petitioner's mechanical approach to projecting a debtor's disposable income would preclude some honest debtors from filing at all and would permit other debtors with relatively abundant resources to avoid repaying their creditors what they can afford. That is not what Congress intended in creating the Chapter 13 system or in amending it in 2005.

1. Under petitioner's approach, respondent would be required to commit to make payments of $756 per month, leaving her with $1166 per month for living expenses. Pet. App. 6, 44 & n.11. That amount is $408 less than the standard deductions for housing, utilities, food, clothing, and household and personal care supplies—without even considering transportation, taxes, health care, and telecommunication expenses. Pet. App. 44 n.11. Because that approach would require respondent to commit to making payments that she cannot possibly afford, petitioner's plan is not confirmable. See 11 U.S.C. 1325(a)(6) (requiring as a condition of confir-

mation that "the debtor will be able to make all payments under the plan and to comply with the plan").

Petitioner acknowledges (Br. 48) that his reading of Section 1325(b)(1)(B) "may effectively deny [respondent] Chapter 13 bankruptcy relief" because she cannot propose a confirmable plan. That consequence will not be unusual among Chapter 13 debtors, many of whom are in respondent's situation. In fact, petitioner's interpretation of Section 1325(b)(1)(B) often will deny bankruptcy protection to those who need it most: debtors whose financial situation has significantly deteriorated over the six months prior to filing. Pet. App. 71-72.

Many people seek bankruptcy protection after losing a source of income or incurring an unusual and onerous expense. Such events cause financial distress precisely because they are unexpected. Section 1325(b)(1)(B) does not require bankruptcy courts to treat such events either as if they did not happen (as in the case of a recently lost job) or as if they can be expected to recur in the future (as in the case of an exceptional expense of limited duration). Instead, Section 1325(b)(1)(B) requires judges to approve a repayment plan that reflects a debtor's actual circumstances. As bankruptcy courts have recognized, "[b]ecause people are frequently forced to file for bankruptcy relief as a result of sudden life-altering events," there are "numerous debtors who would be foreclosed from seeking bankruptcy protection" if their current net incomes were mechanically projected into the future, without any consideration of their actual financial circumstances. *In re Jass*, 340 B.R. at 417; see Thomas J. Izzo, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 Emory Bankr. Devs. J. 521, 546

(2009); cf. *In re Grady*, 343 B.R. 747, 752 (Bankr. N.D. Ga. 2006) ("Certainly the proponents of BAPCPA did not intend to close the bankruptcy court doors to debtors who voluntarily, and in good faith, seek to repay creditors with the funds they actually have on hand each month."). That is not what Congress intended when it enacted BAPCPA.

In other Chapter 13 cases, adoption of petitioner's mechanical approach would work unfairness to creditors. On petitioner's reading of Section 1325(b)(1)(B), a debtor who had been unemployed for six months could file a Chapter 13 petition on the eve of obtaining a new job, commit to repaying little or nothing to unsecured creditors, and still obtain an eventual discharge of his pre-petition debts. See, *e.g.*, *In re Arsenault*, 370 B.R. 845, 847 (Bankr. M.D. Fla. 2007) (debtor filed his Chapter 13 petition in October and did not include his yearly bonuses in the calculation of his current monthly income). Similarly, a debtor could claim a significant expense that he will not incur during the plan period. See, *e.g.*, *In re Turner*, 574 F.3d at 355-356. That result is squarely at odds with one of BAPCPA's core purposes: to deter abuse of the bankruptcy system by debtors with an actual ability to repay some or all of their debts.

Petitioner observes (Br. 50) that "the results of the mechanical approach are neither consistently harsh nor weighted for or against debtors," noting that in some cases reliance on historical figures will produce "a more 'debtor-friendly' result." But it is equally true that, under the court of appeals' approach, consideration of likely changes in financial circumstances will require debtors to make higher payments in some cases and allow them to make lower payments in others. That the mechanical approach does not systematically advantage

or disadvantage debtors therefore provides no basis for preferring it to the court of appeals' analysis, which also does not systematically advantage or disadvantage debtors. Unlike petitioner's mechanical approach, however, the court of appeals' interpretation of the term "projected disposable income" furthers Congress' intent that every Chapter 13 debtor be required as a condition of plan confirmation to make payments at (*i.e.*, neither above nor below) the maximum level she can afford.

2. Petitioner observes (Pet. Br. 51) that "[t]he debtor * * * always has control over the date of the filing of the petition," and he suggests various means by which a debtor may evade the result that the mechanical approach would otherwise produce. See also NACBA Am. Br. 9. Petitioner further suggests (Pet. Br. 53) that a debtor in respondent's position may simply dismiss her case and re-file a new petition in order to avoid an unfavorable six-month look-back period. But the potential for debtors to manipulate the bankruptcy system through strategic filing is a further disadvantage of petitioner's approach, not a reason to adopt it. See *2005 House Report* 5 (explaining that one of Congress's goals in enacting BAPCPA was to prevent the continued use of "loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse"). The various stratagems that petitioner suggests also run counter to the longstanding requirement that Chapter 13 plans be proposed "in good faith." 11 U.S.C. 1325(a)(7).[7]

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[7] Petitioner further suggests (Br. 53-54) that respondent could have filed a Chapter 7 liquidation rather than a Chapter 13 repayment plan. In enacting BAPCPA, however, Congress sought to increase the amount of money unsecured creditors will receive from the bankruptcy

In any event, petitioner is incorrect in suggesting that debtors whose actual income is less than the "current monthly income" calculated with reference to the pre-petition six-month period generally will be able to manipulate the system so that their "projected disposable income" reflects their current or anticipated reality. Experience has shown that the principal motivation for many Chapter 13 filers is protection from mortgage foreclosure. See, *e.g.*, *In re Monson*, No. 09-20487, 2009 WL 4663864, at *2 (Bankr. D. Wyo. Dec. 7, 2009); *In re Snipes*, 314 B.R. 898, 902 (Bankr. S.D. Ga. 2004); *In re Boomgarden*, 780 F.2d 657, 658-659 (7th Cir. 1985); Pamela Smith Holleman & Lesley M. Varghese, *Bankruptcy and Mechanics' Lien in Foreclosure: An Overview*, 91 Mass. L. Rev. 116, 117 (2008).[8] A debtor facing the threat of foreclosure usually files a bankruptcy petition not only to cure the arrearages on her mortgage, but also to take advantage of the protection offered by the automatic stay provision in 11 U.S.C. 362. Such a debtor cannot wait several weeks or months before filing a petition without risking the loss of her home. Petitioner's further suggestion that a debtor could simply dismiss and re-file her petition in order to change the court's calculation of her "current monthly income" similarly ignores the circumstances confronted by debtors who are facing foreclosure. When a debtor behaves as petitioner suggests, she may forfeit protection of the

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system by shifting more debtors from Chapter 7 into Chapter 13. *2005 House Report* 2; *id.* at 12 .

[8] See also John Eggum, *et al*, *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 Utah L. Rev. 1123, 1126; Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 Ind. L.J. 1, 48 (1987).

automatic stay, again risking the loss of her home. See 11 U.S.C. 362(c)(3)(A).[9]

Finally, both petitioner and his amicus suggest (Pet. Br. 21-22, 51-52; NACBA Am. Br. 10, 20, 26) that a Chapter 13 debtor can evade the result mandated by the mechanical approach by deliberately failing to file a Schedule I statement of income and subsequently asking the court to set a different six-month look-back period for calculating the debtor's "current monthly income." See 11 U.S.C. 101(10A)(A)(ii) (providing that current monthly income may be calculated with reference to a six-month period ending on "the date on which current income is determined by the court * * * if the debtor does not file the schedule of current income required by 521(a)(1)(B)(ii)"). But the filing of a Schedule I is mandatory unless excused by the court, see 11 U.S.C. 521(a)(1)(B)(ii); *In re Shelor*, No. 08-80738C-13D, 2008 WL 4344894, at *2 (Bankr. M.D.N.C. Sept. 23, 2008), and a debtor's breach of that requirement may lead to dismissal of his petition, see 11 U.S.C. 521(i)(1); *In re Dunford*, 408 B.R. 489, 493 (Bankr. N.D. Ill. 2009); Fed. R. Bankr. P. 1007(c). The approach that petitioner and his amicus propose therefore would encourage debtors to disregard the requirements of the Bankruptcy Code, and to place their eligibility for bankruptcy relief at risk, simply to ensure that their repayment plans reflect their

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[9] In addition, Section 109(g) prohibits the filing of any type of bankruptcy by a debtor who has had a case pending within the preceding 180 days if the case was dismissed "for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case," or if the debtor had the prior case voluntarily dismissed "following the filing of a request for relief from the automatic stay."

actual ability to pay. Congress cannot reasonably be thought to have intended that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Interest Of *Amicus Curiae*

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,400 consumer bankruptcy attorneys nationwide. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.[1]

NACBA has participated as *amicus* in various courts seeking to protect the rights of consumer bankruptcy debtors and advocates nationally on issues that cannot adequately be addressed by individual member attorneys. Among other things, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA and its membership have a vital interest in the resolution of the question presented, because the calculation of a debtor's "projected disposable income" is of fundamental importance to the administration of Chapter 13 cases, and member attorneys represent

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

individuals in a large portion of all Chapter 13 cases filed. Through its educational and representational functions, NACBA seeks to ensure the predictability of Chapter 13 relief for both consumer bankruptcy debtors and the consumer bankruptcy bar.

Statement

A. Chapter 13 Plan Confirmation Before BAPCPA

1. *Pre-BAPCPA Statutory Provisions.* Before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 ("BAPCPA"), Section 1325(b)(1) of the Bankruptcy Code precluded a court from confirming a proposed Chapter 13 plan over the objection of the trustee or a creditor,

> unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's *projected disposable income* to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1)(B) (2000) (emphasis added). Section 1325(b)(2) defined "disposable income" to mean "income which is received by the debtor and which is not reasonably necessary to be expended." 11 U.S.C. § 1325(b)(2)(B) (2000). Although the Code did not further define "reasonably necessary" expenses, a bankruptcy debtor was required to list monthly income and expenses on Schedules I

("Current Income of Individual Debtor(s)") and J ("Current Expenditures of Individual Debtor(s)"). Fed. R. Bankr. P. Official Form 6, Schedules I-J (2004).

2. *Pre-BAPCPA judicial applications.* Under this statutory regime, "'disposable income' was calculated by subtracting the debtor's monthly expenses (reported on Schedule J) from the debtor's monthly income (reported on Schedule I)." *In re Boyd*, 414 B.R. 223, 230 (Bankr. N.D. Ohio 2009); *see also In re Reeves*, 405 B.R. 135, 138 (Bankr. D. Del. 2009); Fed. R. Bankr. P. Official Form 6, Schedule J (2004). Upon objection to a plan, however, bankruptcy courts enjoyed wide discretion to determine, on a case-by-case basis, which items listed in a debtor's Schedule I could be properly counted as income[2] and the extent to which Schedule J expenses were reasonably necessary.[3] Accordingly,

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[2] *See, e.g., In re Killough*, 900 F.2d 61, 66 (5th Cir. 1990) (per curiam) (overtime is not income); *In re Taylor*, 212 F.3d 395, 397 (8th Cir. 2000) (pension funds constitute income); *Watters v. McRoberts*, 167 B.R. 146, 147–48 (S.D. Ill. 1994) (personal injury recovery is income); *In re Ferretti*, 203 B.R. 796, 800 (Bankr. S.D. Fla. 1996) (personal injury proceeds are not income).

[3] *See, e.g., In re Watson*, 403 F.3d 1, 8 (1st Cir. 2005) (private school tuition not a reasonable expense); *In re Woodman*, 379 F.3d 1, 4 (1st Cir. 2004) (monthly cigarette expenditure reasonably necessary); *In re Taylor*, 243 F.3d 124, 129 (2d Cir. 2001) (whether pension contributions represent income or reasonably necessary expenses depends on "the facts of each individual case"); *In re Lynch*, 299 B.R. 776, 779–80 (W.D.N.C. (continued...)

the highly discretionary pre-BAPCPA "disposable income" standard led to disparate, unpredictable results among bankruptcy courts.[4]

Once disposable income was determined in this manner, courts calculated "*projected* disposable income" by multiplying the debtor's monthly "disposable income" by the number of months in the plan. *See, e.g., In re Gonzales*, 157 B.R. 604, 613 (Bankr. E.D. Mich. 1993) (describing judicial discretion over "disposable income," followed thereafter by multiplication); *In re Campbell*, 198 B.R. 467, 474 (Bankr. D.S.C. 1996) (stating that the "court should determine projected disposable income by calculating a debtor's present monthly income and expenditures and extending those amounts over the life of the plan" (citations omitted)). That figure represented the amount the debtor was obliged to pay all creditors over the life of the plan.

B. BAPCPA's Revisions to Chapter 13

1. "[S]ection 1325(b) was substantially amended by the 2005 amendments to the Bankruptcy Code."

2003) (holding Catholic school tuition for debtors' children was not reasonably necessary, and stating that matter must be resolved "on a case-by-case basis, heavily dependent on the facts").

[4] *Compare, e.g., In re Hagel*, 184 B.R. 793, 796–99 (B.A.P. 9th Cir. 1995) (social security benefits constitute income) *with In re Brady*, 86 B.R. 616, 617 (W.D. Mo. 1987) (social security is not income).

8 *Collier on Bankruptcy* ¶ 1325.08[1], pp. 1325–53 (15th ed. rev. 2009). Section 1325 now provides that a court may not confirm a plan over the objection of the trustee or an unsecured creditor,

> unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's projected disposable income to be received in the [~~three–year~~] *applicable commitment* period beginning on the date that the first payment is due under the plan will be applied to make payments *to unsecured creditors* under the plan.

11 U.S.C. § 1325(b)(1)(B) (2009) (added language in italics; removed language in strike-out and brackets). Significantly, BAPCPA restricts a debtor's "projected disposable income" to repayment of unsecured creditors only.

In addition, BAPCPA fundamentally redefines a Chapter 13 debtor's "disposable income." Section 1325(b)(2) now provides, in relevant part, "[f]or purposes of this subsection, the term 'disposable income' means *current monthly income* received by the debtor . . . less amounts reasonably necessary to be expended." 11 U.S.C. § 1325(b)(2) (emphasis added). In turn, BAPCPA defines "current monthly income" as "the average monthly income from all sources that the debtor receives . . . derived during the 6-month period" prior to filing the bankruptcy petition. 11 U.S.C. § 101(10A)(A)(i); *see also id.* § 101(10A)(A)(ii) (if debtor does not file Schedule I, six-month lookback period begins when court determines debtor's current income). This figure

excludes certain income, such as social security benefits. 11 U.S.C. § 101(10A)(B).[5]

On the expense side, for a debtor whose "current monthly income" is above the median monthly income in the debtor's state for the debtor's household size (known as "above-median debtors"), BAPCPA provides that the amounts reasonably necessary to be expended "shall be determined in accordance with subparagraphs (A) and (B) of [S]ection 707(b)(2)." 11 U.S.C. § 1325(b)(3). Section 707(b)(2), in turn, provides deductions for standardized "expense amounts specified under the National and Local Standards . . . issued by the Internal Revenue Service for the area in which the debtor resides," secured debts, and other specifically permitted expenses. 11 U.S.C. § 707(b)(2)(A). Departures from this scheme are expressly restricted, *see* 11 U.S.C. § 707(b)(2)(A)(ii)(II)–(V), and require the debtor to demonstrate "special circumstances" with prescribed documentation signed under oath, 11 U.S.C. § 707(b)(2)(B). Form 22C provides entry lines for the specified deductions and directs the above-median debtor to calculate "disposable income" by subtracting those deductions

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[5] Under Federal Rule of Bankruptcy Procedure 1007(b)(6), all Chapter 13 debtors calculate "current monthly income" on Form 22C, entitled "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income." In addition, Chapter 13 debtors must still file Schedules I and J. *See* 11 U.S.C. § 521(a).

from "current monthly income." *See* Fed. R. Bankr. P. Official Form 22C.

2. BAPCPA thus amended Section 1325(b) to provide a fixed, bright-line formula to calculate "disposable income." *See* 8 *Collier on Bankruptcy*, *supra*, ¶ 1325.08[1], pp.1325–53. On the income side of the equation, Congress prescribed a historical average as the best approximation of "current monthly income" and excluded certain types of income that bankruptcy courts had previously included. *See, e.g.*, 11 U.S.C. § 101(10A) (excluding Social Security payments and reversing cases like *In re Hagel*, 184 B.R. 793). On the expense side, Congress established standard deductions for above-median debtors and specified the narrow circumstances in which departures from the standardized amounts are permitted. *See* 11 U.S.C. § 1325(b)(3). The changes BAPCPA made to the definition of "disposable income" on both the income and expense sides reflect Congress's rejection of the broad discretion courts exercised under the pre-BAPCPA regime in favor of a prescribed formula that produces more uniform and predictable results.[6]

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[6] BAPCPA adopted bright-line rules to restrict pre-existing judicial discretion in other areas as well. *See e.g.*, 11 U.S.C. §§ 707(b) (means test), 511 (setting interest rates on tax claims), 362(b) (exceptions to automatic stay), 362(c)(3),(4) (limiting applicability of automatic stay for repeat filers).

C. Proceedings Below

1. On October 16, 2006, respondent filed a petition in the United States Bankruptcy Court for the District of Kansas ("bankruptcy court") seeking relief pursuant to Chapter 13. The petition included Form B22C (now designated 22C) and other schedules.[7] Within the six-month period before her filing, respondent received a buyout from her former employer for $11,990.03 in April 2006 and $15,356.42 in May 2006. As a result, Form 22C indicated Lanning's "current monthly income" as $5,343, making her an above-median debtor in Kansas. Subtracting the permitted deductions from this value yielded a monthly "disposable income" of $1,114.98.

Although respondent's Form 22C indicated substantial "disposable income," her plan proposed monthly payments of only $144 (initially for 36 months), an amount reflecting her rough net income according to Schedules I and J. The Trustee—petitioner herein—acknowledged that respondent could not afford to fund a $1,114.98-per-month plan, but still, at his discretion, objected to confirmation of the proposed plan, arguing that Section 1325(b) requires respondent either to repay her unsecured

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[7] Respondent did not avail herself of the option to reset the period for determining "current monthly income." *See* 11 U.S.C. § 101(10A)(A)(ii).

creditors in full or commit the "disposable income" calculated on Form 22C to repayment. Pet. App. 58.[8]

2. These facts do not present a paradigmatic Chapter 13 case and suggest that respondent's inflated "disposable income" could easily have been avoided. Had respondent, or her counsel, waited only several more weeks before filing her petition, her "current monthly income" would not have been distorted by the one-time severance payments from her former employer. Respondent's plan, statement of financial affairs, and the claims register do not indicate that an immediate bankruptcy filing was necessary to avert a foreclosure, repossession of an automobile, or any other collection activity presenting imminent harm.

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[8] The Trustee's objection to respondent's Chapter 13 plan—and corresponding reliance on the plain-language approach to Section 1325—is contrary to the position taken by trustees in similar cases, many of whom have advocated a return to the former discretionary practices and using Schedules I and J to determine disposable income. *See e.g.*, *In re Kibbe*, 361 B.R. 302, 306–07 (B.A.P. 1st Cir. 2007); *In re Austin*, 372 B.R. 668, 672 (Bankr. D. Vt. 2007); *In re Guzman*, 345 B.R. 640, 644–45 (Bankr. E.D. Wis. 2006). The decision to object, moreover, is within the discretion of the Trustee, who could have accepted respondent's plan as the maximum repayment she could afford. *See* 8 *Collier on Bankruptcy* ¶ 1325.08 [5][a], pp. 1325–66 (15th ed. rev. 2009) (reasoning that neither trustees nor unsecured creditors have an "interest in objecting to plans where debtors are paying all that they can truly afford").

Moreover, even if her filing was urgent, respondent could have sought to modify the start date of the six-month "lookback" period for calculating "current monthly income." *See* 11 U.S.C. § 101(10A)(A)(ii) (pegging start date of lookback period to date "on which current income is *determined by the court*" rather than to date petition is filed, where debtor does not file Schedule I with petition (emphasis added)). Alternately, respondent could have filed for, or converted to, Chapter 7 relief, 11 U.S.C. § 706(a), and argued that the buyout constituted special circumstances justifying an adjustment to her "current monthly income," *see* 11 U.S.C. § 707(b)(2)(B).[9] Even if successful in this case, respondent would appear to be better served by converting to Chapter 7 because (1) she has no arrears to cure or secured debts that require modification in Chapter 13; and (2) she would no longer have to pay any post-petition income to her unsecured creditors.

3. In determining whether respondent's Chapter 13 plan committed to unsecured creditors all of her "projected disposable income," 11 U.S.C. § 1325(b)(1)(B)—and could, therefore, be confirmed

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[9] Respondent also could have argued that her severance payments did not constitute income "derived" during the six-month lookback period and, thus, were not part of her "current monthly income." *See* 11 U.S.C. § 101(10A). *Cf.* 8 *Collier on Bankruptcy* ¶ 507.05 [5][b], pp. 507–38 (15th ed. rev. 2009) (citing cases holding that severance benefits are "earned" under 11 U.S.C. § 507(a)(4) "pro rata over the period of the employee's employment").

over the Trustee's objection—the bankruptcy court concluded "that the term 'projected' is a forward-looking concept that . . . requires [ ] this Court to consider at confirmation the debtor's actual income as it is reported on Schedule I . . . , as well as any reasonably anticipated changes in that income." Pet. App. 69. The bankruptcy court thus construed Section 1325(b) to "presume that the number resulting from [Form 22C] is the debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in circumstances." *Id.* at 73.

Comparing respondent's Form 22C "current monthly income" to the monthly income reflected on her Schedule I (which reflects the debtor's estimate of her monthly income at the time the petition is filed), the bankruptcy court observed that "her [Form 22C] 'current monthly income' . . . was skewed upwards" by the pre-petition buyout from her former employer. Pet. App. 56–57. As a result, the bankruptcy court identified respondent's Schedule I as the proper measure of her "projected disposable income." *See id.* at 80. Without considering the alternatives available to the debtor—such as resetting the lookback period—the bankruptcy court reasoned that applying Form 22C would produce the "absurd" result that debtors, like respondent, suffering a sudden and significant decrease in income would be prevented "from ever being able to file a feasible and confirmable Chapter 13 repayment plan." *Id.* at 70–71. Because the bankruptcy court applied respondent's Schedule I income, subtracting her Form 22C expenses resulted in a negative

number.[10] The court thus overruled petitioner's objection and permitted respondent to elect to pay any amount to unsecured creditors over a five-year period. *See id.* at 80.

Reviewing only the income side of respondent's "projected disposable income," both the United States Bankruptcy Appellate Panel of the Tenth Circuit and the United States Court of Appeals for the Tenth Circuit affirmed. Pet. App. 51–53, 31–32.

Summary Of Argument

I. BAPCPA's plain language requires a reviewing court to calculate "projected disposable income" by multiplying "disposable income"—"current monthly income" less standardized deductions—across the life of the Chapter 13 plan. First, the ordinary meaning of "projected" contemplates multiplication of "disposable income." Second, the structure of Section 1325(b) links "projected disposable income" to the adjacent definition of "disposable income" in a manner that makes clear that the word "projected" does not change the meaning of "disposable income." Finally, Section 1325(b)(3)'s command that an above-median debtor's authorized deductions reflect established IRS standards (and other specified expenses) subject

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[10] The bankruptcy court determined that Section 1325(b)(3) required above-median debtors, such as respondent, to "deduct from income the expenses they itemize on Form B22C." Pet. App. 75.

only to express exceptions confirms both BAPCPA's creation of a bright-line calculation of "projected disposable income" and Congress's decision that any deviations be clearly authorized by the statutory text.

The Tenth Circuit's "forward-looking" approach to calculating "projected disposable income"—which permits a reviewing court to set aside Congress's definition of "disposable income" in calculating the "projected disposable income" available to pay unsecured creditors—violates BAPCPA's plain language. First, the approach inserts into Section 1325(b)(2) a rebuttable presumption that Congress did not adopt. Second, by permitting courts to displace Congress's six-month lookback method for calculating "disposable income" with different income data, the forward-looking approach reduces Section 1325(b)(2)'s careful definitions of "current monthly income" and "disposable income" to mere surplusage. Finally, viewed in context, the statutory terms relied upon as support for the forward-looking approach are fully consistent with the plain-language approach.

II. While the language chosen by Congress is conclusive, additional indicia of congressional intent buttress the plain-language approach to calculating "projected disposable income." The relationship that the plain-language approach posits between the term "projected" and the defined phrase "disposable income" mirrors the pre-BAPCPA judicial method for generating "projected disposable income": the debtor's "disposable income" was "projected" by multiplying the debtor's "disposable income" by the

duration of the plan. Signaling Congress's acceptance of this mode of calculation, BAPCPA largely retains the language of its predecessor provision, except to substitute Section 1325(b)(2)'s definition of "disposable income" for the judicial discretion used to establish that value before BAPCPA.

Although purporting to interpret "projected disposable income," the forward-looking approach, in practice, effects a judicial redefinition of "disposable income" to restore the pre-BAPCPA understanding of those terms. Under that approach, courts justify *rejecting* use of BAPCPA's six-month lookback period by misplacing reliance on certain statutory terms and phrases in Section 1325(b). Because Congress's redefinition of "disposable income" does not deprive those terms and phrases of meaning, they provide no basis to reinstitute judicial discretion over "disposable income" and undermine Congress's response to pre-BAPCPA judicial practice.

III. The plain-language approach vindicates Congress's deliberate choice to adopt a bright-line calculation of "projected disposable income." Congress anticipated that the rule it created could be overinclusive and underinclusive in particular applications by prescribing limited exceptions to permit a reset of the six-month lookback period on the income side and additional deductions in "special circumstances" on the expense side. The results of applying this approach are not absurd, but rather the product of rational policy choices made by Congress. If those choices prove unjust or

unworkable in practice, it is for Congress, not the courts, to rewrite the statute.

The forward-looking approach undercuts the policies—predictability and uniformity—supporting BAPCPA's creation of a clear rule. Moreover, in authorizing departures from BAPCPA's integrated bankruptcy regime, the forward-looking approach distorts calculations elsewhere in the statutory scheme, thereby threatening anomalous results.

IV. In the alternative, if the Court rejects the plain-language approach, it should adopt a forward-looking approach that minimizes deviations from BAPCPA's definition of "disposable income" on the income side. Because, on the particular facts of this case, the bankruptcy court did not include in its calculation of respondent's "projected disposable income" any income categories BAPCPA expressly excludes from "disposable income," and because the case does not provide a proper vehicle to question application of BAPCPA on the expense side, the Court could affirm.

Argument

I. The Plain Language of Section 1325 Precludes the Forward-Looking Approach to Calculating a Chapter 13 Debtor's "Projected Disposable Income."

"The starting point in discerning congressional intent is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). "It is well established that 'when the statute's

language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Here, BAPCPA plainly directs that an above-median debtor's "projected disposable income" is the value derived by multiplying "disposable income"—the debtor's "current monthly income" less permitted deductions—over the life of the plan. The Tenth Circuit's contrary forward-looking approach, under which courts may *dispense with* Congress's formula for calculating "disposable income" upon "a showing of a substantial change in circumstances," Pet. App. 32, ignores BAPCPA's clear command and improperly reads into the statute terms Congress chose not to adopt. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." (citation omitted)).

A. BAPCPA's plain language and structure tie "projected disposable income" to "disposable income" in a clear mathematical formula.

BAPCPA redefined the concept of "disposable income." On the income side, Section 1325(b)(2) requires calculation of the debtor's average monthly income for an historic six-month period, excluding specified sources of income. *See* 11 U.S.C. § 1325(b)(2) (relying on "current monthly income");

id. § 101(10A) (defining "current monthly income" as an historical average with specified exclusions). On the expense side, for above-median debtors, Congress specifically defined the allowable deductions from "current monthly income." *See id.* § 1325(b)(2) (subtracting from "current monthly income" "amounts reasonably necessary to be expended"); *id.* § 1325(b)(3) (defining "amounts reasonably necessary to be expended" according to IRS standards and other specified categories as provided in 11 U.S.C. § 707(b)(2)). In this way, BAPCPA eliminated the substantial discretion bankruptcy courts previously exercised in calculating a debtor's "disposable income." *See supra* pp. 3–7. And, by redefining "disposable income" in terms of historical income and standard deductions, Congress provided a "clear indication" of its intent to eliminate any pre-existing judicial practices to the contrary. *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998).

In Section 1325(b)(1)(B), Congress directed that the figure derived from applying its new definition of "disposable income" be "projected" to determine whether the court may approve a Chapter 13 plan over the objection of the trustee or an unsecured creditor. *See* 11 U.S.C. § 1325(b)(1)(B). As explained below, BAPCPA clearly links "projected" with the new definition of "disposable income" in a manner that equates "projected disposable income" with "disposable income" "projected" (or multiplied) over the plan period.

1. A common meaning of "projected" illustrates that Section 1325(b)(1)(B)'s use of that term is not meant to modify or supplant BAPCPA's definition of

"disposable income." *See United States v. Rodgers*, 466 U.S. 475, 479 (1984) ("We . . . start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.") (citation omitted). "Projected" is defined to mean, *inter alia*, "thrown or as if thrown or cast forward." *Webster's Third New International Dictionary*, at 1813 (1993). This understanding is particularly apt where, as here, the value to be "projected" is fixed or known in the past (*i.e.*, "current monthly income"). For example, the "projected" path of a straight line is simply the continuation of its past, known path. Congress's use of the word "projected" in connection with a fixed value—"disposable income" as Congress defined it—indicates that Congress intended that value to be "cast forward" over the life of the bankruptcy plan.

2. Reading the language and considering the structure of Section 1325 "as a whole," *United States v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007), further demonstrates that Congress intended "projected disposable income" to mean nothing more than "disposable income" "projected" or multiplied over the life of the plan. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme."). Section 1325(b)(2)'s definition of "disposable income" and Section 1325(b)(1)(B)'s use of "projected disposable income" are in "adjacent" provisions and "can be understood only with reference" to one another. *Atl. Research Corp.*, 551 U.S. at 135. "Bolstering the structural link, the text also [expressly] denotes a

relationship between the two provisions." *Id.* Specifically, Section 1325(b)(2) states that "disposable income" is defined "for the purposes of this subsection," *i.e.*, Section 1325(b). The only other mention of "disposable income" in the section is in the requirement that a debtor's "projected disposable income" be applied to repay unsecured creditors. 11 U.S.C. § 1325(b)(1)(B). Thus, if BAPCPA's definition of "disposable income" is to serve its structurally demonstrated purpose, it must provide the value that is "projected" to determine the amount a debtor must pay unsecured creditors over the life of the plan. *See, e.g., Cohen*, 523 U.S. at 220 (presuming "equivalent words have equivalent meaning when repeated in the same statute"). If "projected disposable income" is read instead as an "undefined and free-standing" phrase, *In re Austin*, 372 B.R. 668, 677 (Bankr. D. Vt. 2007), then Congress's new definition of "disposable income" loses its place in the statutory scheme.

3. Finally, BAPCPA's express delineation of "special circumstances" exceptions on the expense side supports reading "projected disposable income" as the value defined by "disposable income" (then "projected" into the future). *See Atl. Research Corp.*, 551 U.S. at 135. Section 1325(b)(3) includes a plain command, directing that "reasonably necessary" expenses "shall" be determined in accordance with provisions that also serve to determine whether a Chapter 7 debtor has engaged in abuse. 11 U.S.C. § 1325(b)(3) (referencing 11 U.S.C. § 707(b)(2)(A) and (B)). *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress's "use of a mandatory 'shall' . . . to

impose discretionless obligations"). Those provisions specify both expense amounts and expense categories, *see* 11 U.S.C. § 707(b)(2)(A)(ii), and also establish a method for the debtor to depart from the standard calculation upon a showing of "special circumstances," *id.* § 707(b)(2)(B) (outlining documentation necessary to establish "special circumstances, such as a serious medical condition or . . . active duty in the Armed Forces").

Section 1325(b)(3) and the expense provisions it references demonstrate that Congress, in drafting BAPCPA, knew how to authorize deviations from otherwise mandatory calculations to avoid unintended consequences. It is significant, therefore, that Congress chose not to authorize the same "special circumstances" deviation with respect to the income side of BAPCPA's formula for determining "disposable income." *Cf. Clay v. United States*, 537 U.S. 522, 528 (2003) ("When Congress includes particular language in one section but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Instead, Congress provided a different mechanism on the income side, permitting a debtor to seek a reset of the six-month lookback period, to run from the date the court determines the debtor's current income rather than from the filing of the petition. *See* 11 U.S.C. § 101(10A)(A)(ii).

B. The forward-looking approach violates BAPCPA's plain language.

The forward-looking approach construes Section 1325 to authorize, at the reviewing court's discretion, deviations from the precise calculations mandated by Congress. Under one version of this approach, courts read the concept of "projected disposable income" to "necessarily contemplate[] a forward-looking number" that "take[s] into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on Schedules I and J." *In re Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008). Courts applying this approach reject Congress's definition of "disposable income" because it "does not take into consideration a debtor's current financial situation, which may have changed." *Id.* at 658–59.

Recognizing that this approach "renders the new definition of 'disposable income,' with its link to historic 'current monthly income,' nearly meaningless," Pet. App. 24, the Tenth Circuit adopted another version of the forward-looking approach, under which Congress's definition of "current monthly income" produces the presumptively correct value, subject to being "rebutted by showing a substantial change in circumstances," *id.* *See also In re Turner*, 574 F.3d 349, 356 (7th Cir. 2009) (holding that "disposable income" is a "starting point" subject to changes in circumstances). As the Tenth Circuit acknowledged, however, its approach "requires a certain disregard of the notion that Congress knows how to create a presumption when it intends one." Pet. App. 24.

That approach also deprives Congress's definition of any effect in all cases involving a "substantial change in circumstances." Moreover, taken in context, the statutory phrases that the Tenth Circuit and other courts rely upon to support the forward-looking approach cannot bear the weight placed upon them.

1. In defining the income side of "disposable income," Section 1325 includes no language of presumption or "special circumstances," and a reviewing court cannot read additional terms into congressional text. *See, e.g., Lamie*, 540 U.S. at 538 (rejecting attempt to "read an absent word into the statute"). And "BAPCPA's changes to the Bankruptcy Code made it clear that Congress knows how to create a presumption." *In re Kagenveama*, 541 F.3d 868, 874 (9th Cir. 2008). For example, Congress expressly outlined circumstances under which a court "shall presume abuse exists" in the filing of a bankruptcy petition. *See* 11 U.S.C. § 707(b)(2)(A)(i). "When Congress includes particular language in one section but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Clay*, 537 U.S. at 528.

2. Given that Section 1325's plain language precludes a rebuttable presumption, the forward-looking approach improperly displaces Section 1325(b)(2)'s definition of "disposable income" in any case in which a debtor shows a "substantial change in circumstances." By permitting a reviewing court to ignore the income figure—a historical average—generated by application of the six-month lookback

period and to consider data not expressly authorized by Congress, and even expressly prohibited by Congress, the forward-looking approach violates the basic "assumption that Congress intended each of its terms to have meaning." *Bailey*, 516 U.S. at 145.

The Government posits that the forward-looking approach reserves a role for Section 1325(b)(2) in describing the basic types of income that may be included in calculating "projected disposable income." *See* Brief for the United States as Amicus Curiae on Pet. for a Writ of Certiorari (No. 08-998), at 11. *See also In re Kibbe*, 361 B.R. 302, 311–12 (B.A.P. 1st Cir. 2007); 11 U.S.C. § 101(10A) (excluding, *inter alia*, Social Security benefits). This alternative reading is unpersuasive because BAPCPA did far more than merely identify the types of income properly considered as part of "disposable income" and, by extension "projected disposable income." It mandates a *method* of calculating income that relies on historic income. *See* 11 U.S.C.§ 101(10A). Even under the Government's reading, therefore, the forward-looking approach authorizes a court to nullify this historical approach.

3. The Tenth Circuit and like-minded courts support their forward-looking construction by reference to a series of Section 1325's terms and phrases: (1) "projected"; (2) "as of the effective date of the plan"; and (3) "to be received." *See, e.g.*, Pet. App. 17–18, 24. Their reliance is misplaced. "In expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (citation omitted).

Viewed in context, the terms are completely consistent with the plain-language approach.

"*Projected.*" Most fundamentally, the forward-looking approach concludes that "[i]t would be inappropriate to give heed only to the historical perspective set forth in the term 'disposable income,' as this would effectively write the term 'projected' out of § 1325(b)." *In re Kibbe*, 361 B.R. at 312. *See also In re Jass*, 340 B.R. 411, 415–6 (Bankr. D. Utah 2006). Under the plain-language approach, however, the term "projected" establishes the method of calculation (*i.e.*, multiplication) by which the historically based "disposable income" value is "cast forward" into the future so that it may "be applied to make payments to unsecured creditors" over the length of the plan. 11 U.S.C. § 1325(b)(1)(B).

Moreover, "[t]hose courts that argue Congress intended something more when it referred to 'projected disposable income' in § 1325(b)(1)(B) fail to address the fact that Congress defined 'disposable income' subsequently in § 1325(b)(2)." *In re Kagenveama*, 541 F.3d at 874 (citation omitted). *See also Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Those courts also fail to justify elevating "one word . . . in importance so as to gut an entire" subsection. *In re Hanks*, 362 B.R. 494, 499 (Bankr. D. Utah 2007), *abrogated by In re Lanning*, 545 F.3d 1269. *See also Kelly*, 479 U.S. at 43.

"*As of the effective date of the plan.*" Section 1325(b)(1) provides that "the court may not approve the plan unless, *as of the effective date of the plan*," the plan commits all "projected disposable income" to unsecured creditors. 11 U.S.C. § 1325(b) (emphasis added). The Tenth Circuit observed that "[t]he date of plan confirmation is practically certain to be later than the date on which the petition is filed, and it is the filing date that starts the backward-looking assessment of 'current monthly income.'" Pet. App. 25. But the court concluded from this simple truth that the "effective date" phrase "suggests consideration of the debtor's actual financial circumstances as of the effective date." *See id.*

The Tenth Circuit's reasoning reflects an over-reading of the "effective date" language. The phrase simply directs the bankruptcy court to ensure that, starting on the plan's effective date, all of the debtor's "projected disposable income" is committed to paying unsecured creditors. The "effective date" language has nothing to do with the manner by which Congress intended income to be calculated; rather, the language establishes a precondition to a court's approval of the plan. The fact that a plan is not likely to be confirmed until some time after the petition is filed provides no basis for concluding that Congress intended to plug that gap by dispensing with the historic calculation it mandated in favor of considering the debtor's "actual financial circumstances" at the time of confirmation. Congress was well aware when it defined "current monthly income" as an historical average that the plan's

confirmation date would always postdate the petition. *See* 11 U.S.C. § 1324(b).

Moreover, as noted above, Congress did not limit the historic calculation to the six months preceding the filing of the petition, but permits a debtor to petition the court to reset the lookback period to include months that postdate the petition by appealing to the court's discretion over the filing of Schedule I. *See* 11 U.S.C. § 101(10A)(A)(ii) (lookback date runs from date court determines current income where debtor does not file Schedule I); *see also, e.g., In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009) (granting debtor's motion to excuse filing of Schedule I and resetting lookback period); *In re Dunford*, 408 B.R. 489 (Bankr. N.D. Ill. 2009) (resetting period where debtor's income declined significantly prior to petition).

"*To be received.*" Finally, the Tenth Circuit rejected the plain-language approach as rendering superfluous Section's 1325(b)(1)(B)'s reference to "projected disposable income *to be received*." Pet. App. 25 (emphasis added)). The court reasoned that, where the debtor's income decreases during the six-month lookback period, the debtor has "no realistic expectation" of actually "receiv[ing]" the level of income indicated by "current monthly income." *Id.* at 27.

The Tenth Circuit's position is flawed. Under either approach—plain-language or forward-looking—"to be received" works in tandem with the word "projected." Under the forward-looking approach, the amount "to be received" reflects the

approach's assumption that "projected" is a future-oriented concept that contemplates taking into account changed circumstances. Likewise, under the plain-language approach, "to be received" reflects Congress's assumption that the debtor's future income is best determined by reference to historic income. Thus, the phrase cannot distinguish the two approaches. Instead, the Tenth Circuit's interpretation appears to reflect nothing more than a disagreement with Congress's choice of "historical income as a 'better' predictor of 'projected disposable income.'" Pet. App. 27 (citation omitted). That the debtor's actual income during the plan period may deviate from the amount of "projected disposable income"—whether calculated by reference to "current monthly income" or some other method—does not render the phrase "to be received" superfluous because that phrase is part of a necessarily predictive judgment.

In sum, the forward-looking approach effectively reads an entire subsection—Section 1325(b)(2)—out of BAPCPA. The asserted textual justification for doing so—the supposed meaning of isolated terms and phrases taken out of context—ignores the rule that statutory construction may "not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law." *Kelly*, 479 U.S. at 43 (citation omitted). At any rate, the plain-language approach, which is faithful to Congress's definition of "disposable income," is perfectly consistent with the remainder of Section 1325.

II. Additional Indicia of Congressional Intent Confirm the Plain-Language Approach to "Projected Disposable Income."

The history of the calculation of "projected disposable income" under Chapter 13 "reinforces" the plain reading of BAPCPA. *See Cohen*, 523 U.S. at 221 (reviewing history of Bankruptcy Code's fraud exception to confirm statutory construction). This "tool of construction" "informs [the] understanding of the language of the Code," *Hartford Underwriters Ins. Co.*, 530 U.S. at 10, illustrating that the plain-language approach conforms with that part of prior practice that Congress did not intend to change.

A. The plain-language approach is consistent with the pre-BAPCPA method of projecting "disposable income."

Before BAPCPA, Chapter 13 similarly permitted a court to confirm a debtor's challenged repayment plan if the plan provided for payment of all of the debtor's "projected disposable income." *See supra* p. 2. In practice, courts determined a debtor's "projected disposable income" by first calculating the debtor's monthly "disposable income." Exercising substantial discretion, courts typically calculated "disposable income" by considering the debtor's Schedules I and J as well as "other evidence" to establish the income side of the figure. *See, e.g., In re Kibbe*, 361 B.R. at 307 & n.5 (describing pre-BAPCPA regime); *In re Killough*, 900 F.2d 61, 65 (5th Cir. 1990) (relying on debtor's testimony); *supra*

pp. 3–4.[11] Courts then "projected" the income side of "disposable income" by "multiplying" this value by the number of months in the plan. *See Anderson v. Satterlee*, 21 F.3d 355, 357 (9th Cir. 1994); *In re Killough*, 900 F.2d at 64; *In re James*, 260 B.R. 498, 515 (Bankr. D. Idaho 2001); 5 *Collier on Bankruptcy* ¶ 1325.08 [4][a] (15th ed. 1985); *supra* p. 4. Under pre-existing practice, therefore, courts construed the term "projected" simply to signal a method of calculation—multiplication.

BAPCPA maintained this relationship between "disposable income" and "projected disposable income." Section 1325(b)(2) still directs a court to calculate the debtor's "disposable income." And Section 1325(b) still requires a court to "project[ ]" that "disposable income" over the life of the plan. Just as "projected" signaled multiplication of "disposable income" before BAPCPA, "projected disposable income" now signals multiplication of Congress's new definition of "disposable income." BAPCPA's principal alteration to the existing method of determining "projected disposable income" was its redefinition of "disposable income" as an historic value less standard deductions, *see id.* § 1325(b)(2), to replace the prior discretionary figure. In reenacting the terms of pre-BAPCPA practice,

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[11] Courts exercised similar discretion on the expense side. *See supra* pp. 3–4; *In re Guzman*, 345 B.R. at 642 (observing that expense side involved "many difficult questions of lifestyle and philosophy") (quoting 5 *Norton Bankruptcy Law & Prac. 2d* § 122:10 (2006)).

Congress intended to retain the same, mathematical relationship between them, merely substituting a new, less discretionary value as the multiplicand. *See Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) (Congress presumed aware of existing judicial interpretations when reenacting laws); *In re Kagenveama*, 541 F.3d at 873 ("Any change in how 'projected disposable income' is calculated only reflects the changes dictated by the new 'disposable income' calculation; it does not change the relationship.").

B. The forward-looking approach perpetuates a concept of "disposable income" that Congress expressly repudiated by redefining "disposable income" in Section 1325.

Courts adopting the forward-looking approach "view the phrase 'projected disposable income' as a discrete term of art that has a meaning distinct from the new statutory definition of 'disposable income.'" *In re Austin*, 372 B.R. at 675 (citing cases). *See also* Pet. App. 26 (adopting forward-looking approach); *In re Frederickson*, 545 F.3d at 659; *In re Kibbe*, 361 B.R. at 307–08, 312 (same); *In re Jass*, 340 B.R. at 415–16 (same); *In re Hardacre*, 338 B.R. 718, 722–23 (Bankr. N.D. Tex. 2006) (same). Treating "projected disposable income" as a separate term of art, the forward-looking approach nullifies BAPCPA's definition of "disposable income" through consideration of non-historic income values.

For example, in this case, the lower courts adopted respondent's Schedule I, rather than the

figure produced by calculating her "current monthly income," as the proper measure of her income. *See* Pet. App. 80. In so doing, the courts applied the pre-BAPCPA conception of "disposable income" under the guise of construing the phrase "projected disposable income" in BAPCPA. But the term "projected" should not be permitted to swallow Congress's redefinition of "disposable income" when there is a readily assignable alternative meaning that continues the prior practice of multiplying the debtor's "disposable income" by the number of months in the plan. The lower courts' reliance on other terms and phrases that Congress reenacted without change (*e.g.*, "to be received") similarly provides no basis for denying effect to the language that Congress did change. By applying the pre-BAPCPA concept of "disposable income," the forward-looking approach perpetuates the past judicial practice that Congress expressly *repudiated* when it redefined "disposable income."[12]

III. The Plain-Language Approach Vindicates Congress's Policy Choices.

It is well-settled that the plain language of a statute governs unless "the disposition required . . . [is] absurd." *Lamie*, 540 U.S. at 534. Invoking this maxim to justify departure from BAPCPA's plain

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[12] On the expense side, Congress's adoption of IRS standards and other specified deductions, *see supra* pp. 6–7, signals its intent to preclude courts from scrutinizing and second-guessing a debtor's budget in assessing a repayment plan.

language, courts adopting the forward-looking approach have focused on the perceived "harsh" results of applying that language in some circumstances. *See In re Kibbe*, 361 B.R. at 313–14. Mistaking overinclusiveness and under-inclusiveness for "inaccuracy" and "absurdity," these courts have substituted their own judgments of appropriate bankruptcy policy for Congress's rational decision to employ a predictable, bright-line rule for calculation of "projected disposable income." But courts "do not sit to assess the relative merits of different approaches to various bankruptcy problems." *Hartford Underwriters Ins. Co.*, 530 U.S. at 13. Rather, "[a]chieving a better policy outcome—if what [respondent] urges is that—is a task for Congress, not the courts." *Id.* at 13–14. Moreover, Congress prescribed limited means to avert unintended consequences of its redefinition of "disposable income." *See supra* pp. 10, 26.

A. Application of the plain-language approach implements policy choices made by Congress.

With the enactment of BAPCPA, Congress chose to adopt a bright-line rule for calculating "disposable income" based on monthly income averaged from known historic data, *see* 11 U.S.C. § 1325(b)(2); 11 U.S.C. § 101(10A), and established deductions, *see* 11 U.S.C. § 1325(b)(2)–(3); 11 U.S.C. § 707(b)(2). "Instead of simply looking at the debtor's actual income and expenses, [BAPCPA's] amendments in many cases attempt to create a bright line test to determine whether a debtor's plan is committing all disposable income." 8 *Collier on Bankruptcy*

¶ 1325.08 [1] (15th ed. rev. 2005). *See also In re Barr*, 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006) (concluding Congress adopted a rigid test for above-median debtors).

In comparison to a standard that allows discretionary consideration of case-by-case individualized facts, a rule promotes efficiency, predictability and simplicity in application. *See, e.g., Califano v. Jobst*, 434 U.S. 47, 53, 56–57 (1977) (noting efficiency and simplicity of rule enacted to govern distribution of Social Security benefits to married disabled dependents). By its nature, the bright line drawn by a rule "is to some extent both underinclusive and overinclusive." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (considering retirement rule differentiating between Civil Service and Foreign Service employees). As courts have recognized, the rule adopted by BAPCPA demonstrates this characteristic where a debtor's income changes drastically soon before or after filing a Chapter 13 petition. *See* Pet. App. 30–31; *In re Kibbe*, 361 B.R. at 314.[13] Because "[v]irtually *every* legal (or other) rule has imperfect applications in particular circumstances," *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (emphasis original), in drawing a bright line, "perfection is by no means required," *Vance*, 440 U.S.

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[13] If the debtor's income increases relative to historic income, the calculation of "current monthly income" obligates the debtor to pay less than he or she can now afford. If the debtor's income decreases, "current monthly income" obligates the debtor to pay a monthly sum he or she can no longer afford.

at 108 (quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960)).

If—as in most applications—the debtor's income does not change drastically, "current monthly income" "is a reliable indicator" of the debtor's future income. *Califano*, 434 U.S. at 57. Congress's adoption of "current monthly income" as the measure of a Chapter 13 debtor's income reflects its judgment that historic income is an accurate indicator of a debtor's earning potential for the purpose of funding a repayment plan, and "[t]here is no question about the power of Congress to legislate on the basis of such factual assumptions." *Id.* at 53; *see In re Austin*, 372 B.R. at 679 ("There is no inherent flaw in calculating disposable income based upon an historical figure" and such a policy decision "is well within the prerogative of our Legislative branch."). As a rational policy choice, BAPCPA's clear, easily applied rule is not rendered illegitimate by its over- or underinclusiveness in particular applications. *See Vance*, 440 U.S. at 108–09 (upholding statutory classification based on rational factual assumptions despite over- and underinclusive applications). In fact, there is no "absurdity in reading" a statute "as setting forth a simple, bright-line rule instead of a complex, after-the-fact inquiry." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2339 (2008).

Moreover, undesirable results in peculiar circumstances, without more, do not render a statutory construction "absurd." Despite "the potential for harsh results in some cases," a court is "not free to rewrite the statute that Congress has

enacted." *Dodd v. United States*, 545 U.S. 353, 359 (2005) (upholding construction of habeas statute of limitations even though it "makes it difficult" for certain applicants to ever obtain relief); *see also Griffin*, 458 U.S. at 575 ("refusing to nullify [statutory language], however hard or unexpected the particular effect"). It is enough that the plain language prescribes a clear rule. "The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court." *Griffin*, 458 U.S. at 576.[14]

B. The forward-looking approach frustrates the policy choices embodied in BAPCPA.

Congress's implementation of a clear rule for calculating "projected disposable income" was a response to unpredictable Chapter 13 results caused by unencumbered judicial discretion. The forward-looking approach undermines the congressional policy embodied in that rule by authorizing a return

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[14] Although the results of BAPCPA's expense-side rule have raised additional questions, *see, e.g., In re Barr*, 341 B.R. at 185, the facts of this case—in which the use of standard deductions has never been challenged—do not provide a proper vehicle for their consideration. In any event, the bankruptcy court correctly applied BAPCPA's plain language in determining respondent's expenses. To the extent application of BAPCPA's plain language could facilitate debtor abuse of Chapter 13 (on either the expense or income side), any further alterations to the statutory scheme must come by congressional, not judicial, amendment.

to judicial discretion through consideration of data—including Schedules I and J—that were a cornerstone of the pre-BAPCPA regime Congress replaced. *See supra* pp. 3–4.

The forward-looking approach also threatens to distort the complex, integrated bankruptcy regime created by BAPCPA. *See Fed. Trade Comm'n v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960) (refusing to "derange . . . integrated statutory scheme . . . [by] read[ing] other conditions into the law"). For example, before BAPCPA, "projected disposable income" defined a debtor's repayment obligation to *all* creditors; secured and unsecured. *See supra* p. 2. But under BAPCPA, the calculation of "disposable income" takes into account amounts to be paid for secured claims. Congress thus made a corresponding amendment to Section 1325(b)(1)(B) to make clear that "projected disposable income" will be applied to make payments to *unsecured creditors only*. By relying on data—such as Schedules I and J—used to calculate the pre-BAPCPA broad repayment obligation, the forward-looking approach upsets the BAPCPA formula for determining a debtor's repayment obligations.

IV. If the Court Adopts a Forward-Looking Approach, BAPCPA's Language Requires that Deviations from Section 1325's Definition of "Disposable Income" Be Limited.

In the alternative, if the Court rejects the plain-language approach, the language, intent and policies described above require that the Court adopt a

forward-looking calculation of "projected disposable income" that honors BAPCPA's express exclusion of certain types of income from "disposable income." *See* 11 U.S.C. § 1325(b)(2) (incorporating "current monthly income"); 11 U.S.C. § 101(10A) (excluding from "current monthly income," *inter alia*, "benefits received under the Social Security Act"); *see also In re Kibbe*, 361 B.R. at 311–12 (adopting forward-looking approach while excluding "the Income Exclusions" delineated in BAPCPA).[15] On the peculiar facts of this case, the bankruptcy court's disposition could be affirmed under this approach because the bankruptcy court did not use any expressly excluded values in calculating respondent's "projected disposable income."

First, with respect to the income component of "projected disposable income," the bankruptcy court considered respondent's "disposable income" as calculated on Form 22C, but ultimately relied upon her Schedule I. *See* Pet. App. 56–58, 80. Because respondent's Schedule I did not include any of the income categories expressly excluded under Section 101(10A)—or otherwise expressly excluded under 11 U.S.C. §§ 541(b)(8) and 1322(f)—the bankruptcy

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[15] Congress has demonstrated a plain intent to protect retirement savings and benefits from unsecured creditors. *See, e.g.*, 11 U.S.C. § 541(b)(7) (excluding from estate, *inter alia*, contributions to employee benefit plan); 11 U.S.C. § 1322(f) (repayment plan "may not materially alter" amounts included in pension or other benefits plans). *See also* 42 U.S.C. § 407(a) (excluding Social Security benefits from operation of bankruptcy law).

court's use of Schedule I would be acceptable under the statutory scheme, assuming that Congress's historic approach to income can be abandoned. *See* Pet. App. at 69 & n.21, 80; *see also* Brief for the United States as Amicus Curiae on Pet. for a Writ of Certiorari (No. 08-998), at 11 (recognizing that courts may not expand the categories of income excluded from "projected disposable income").

Second, on the expense side, the bankruptcy court applied the standardized deductions to respondent as an above-median debtor. *See* Pet. App. at 75, 80.[16] Finally, the parties agreed that respondent's prior severance payments affected her "current monthly income," resulting in a "disposable income" she could not afford to pay out to unsecured creditors. *See id.* at 58 (petitioner acknowledges respondent could not fund her plan at her "disposable income").

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[16] The facts of this case, therefore, provide no ground to address any expense-side issues, a number of which have split lower courts. *See, e.g.*, *In re Washburn*, 579 F.3d 934 (8th Cir. 2009) (holding that above-median debtor may claim vehicle-ownership expense for vehicle debtor owns outright without encumbrance); *In re Ransom*, 577 F.3d 1026 (9th Cir. 2009) (reaching opposite conclusion on vehicle ownership); *In re Rudler*, 576 F.3d 37 (1st Cir. 2009) (holding that debtor may deduct payments due on secured debt notwithstanding debtor's intention to surrender the collateral); *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006) (reaching opposite conclusion on secured debt payments). For this reason, although the question presented references the expense side, *see* Cert. Grant (11/2/2009), neither petitioner's merits brief nor the United States' brief on the petition for a writ of certiorari addressed the expense side in detail.

On these specific facts, if this Court rejects the plain-language approach, the bankruptcy court's limited deviation from the statutorily prescribed definition of "disposable income" could be affirmed.

Conclusion

The plain-language approach should be adopted in determining whether a Chapter 13 debtor's plan commits all "projected disposable income" to the repayment of unsecured creditors. In the alternative, deviations from the statutory definition of "disposable income" should be minimal and not include income sources expressly excluded from "current monthly income."

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December 28, 2009

AMICUS CURIAE BRIEF

B094

No. 08-998

IN THE

Supreme Court of the United States

JAN HAMILTON, CHAPTER 13 TRUSTEE,
Petitioner,

v.

STEPHANIE KAY LANNING,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PROFESSOR NED W. WAXMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF PROFESSOR NED W. WAXMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus Curiae teaches and writes in the area of bankruptcy law.[2] He is the author of "*Projected*

[1] Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *amicus curiae* files this brief with the written consent of all parties, which are submitted herewith. No counsel for a party authored this brief in whole or in part. The only person or entity other than the *amicus curiae* making a monetary contribution for the preparation or submission of this brief is the College of William and Mary's Mason School of Business; it has been prepared pro bono.

[2] Ned W. Waxman, J.D., is a Professor at The College of William and Mary's Mason School of Business.

Disposable Income": Legislative Lunacy and Judicial Gyrations, 46 HOUS. L. REV. 867 (2009), Part V of which creates a novel approach to the interpretation of "projected disposable income" in 11 U.S.C. § 1325(b)(1)(B).[3] This new approach is called **"the non-presumptive starting point approach."** He files this brief solely because of the importance of determining the correct interpretation of "projected disposable income," which has been the subject of five differing judicial approaches that have divided the federal courts at every level. He is not predisposed for or against debtors, creditors, or federal or state governmental bodies.

SUMMARY OF ARGUMENT

Amicus curiae supports the Respondent and asserts that, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence showing that the debtor's income or expenses during that period are likely to be significantly different from her income or expenses during the pre-filing period. A forward-looking approach is consistent with both the language of the statute and the intent of Congress. On the other hand, applying the backward-looking mechanical/multiplier approach often produces results that are absurd and manifestly contrary to the legislative intent when the historical figures for "current monthly income" and (for above-median debtors) the means test expenses are significantly

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[3] This brief includes verbatim and paraphrased insertions from Ned W. Waxman, *"Projected Disposable Income": Legislative Lunacy and Judicial Gyrations*, 46 HOUS. L. REV. 867 (2009), with the express written permission of the Editor in Chief of the *Houston Law Review*, dated October 22, 2009.

different from the debtor's anticipated actual income or expenses during the plan period. Under such circumstances, the United States Supreme Court requires that the interpretation be avoided if there is a viable alternative approach that is consistent with Congress' intent. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

The legislative history of BAPCPA makes clear that Congress intended (1) to prevent bankruptcy abuse, (2) to make certain that debtors repay creditors the maximum that they can afford, and (3) to shift can-pay debtors from a Chapter 7 liquidation to a Chapter 13 repayment plan. Although, in attempting to create greater uniformity among the bankruptcy judges in confirming Chapter 13 plans, Congress intended to reduce the bankruptcy court's discretion in ascertaining the debtor's ability to pay by creating a mathematical formula to determine "disposable income" where "*possible*," 146 CONG. REC. S11,700 (2000) (insertions by Sen. Grassley) (emphasis added), Congress never intended to abrogate all judicial authority concerning the court's determination of "*projected disposable income*." Therefore, *Amicus curiae* asserts that the non-presumptive starting point approach best reconciles the backward-looking artificially determined components of "disposable income" (11 U.S.C. §§ 101(10A), 1325(b)(2)-(3)) with the forward-looking nature of not only "projected disposable income" (11 U.S.C. § 1325(b)(1)(B)) but also numerous other pertinent Bankruptcy Code provisions, thereby implementing the requirements concerning confirmation of a debtor's Chapter 13 plan in a manner that is consistent with Congress' intentions.

Under the non-presumptive starting point approach, in calculating "projected disposable income," the court uses the debtor's "current monthly income" (the average of the six months before bankruptcy) and the means test expenses (for an above-median debtor) on Form 22C as a starting point, but it then adjusts when the debtor's actual income or expenses during the plan period are likely to be significantly different. Thus, the Tenth Circuit Court of Appeals in the proceedings below reached the correct result but, in one important respect, for the wrong reason. Although, in showing that Congress intended "projected disposable income" to be forward-looking, the Tenth Circuit appropriately adopted many of the same "reasons that projected disposable income is forward-looking and not based on a multiplier of disposable income" that were set forth by *Amicus curiae* in an earlier law review article,[4] the Tenth Circuit's reliance on a presumption is misguided and unnecessary. *In re Lanning*, 545 F.3d 1269, 1278-79, 1282 (10th Cir. 2009). Instead, "the non-presumptive starting point approach" reaches the same result without relying on a presumption that Congress never intended, either expressly or impliedly. Waxman, 46 HOUS. L. REV. at 897-903 (2009).

More specifically, "the non-presumptive starting point approach" relies on the United States Supreme Court's two exceptions to the "plain meaning" rule in situations in which a literal interpretation produces an absurd result, *Lamie v. United States Trustee*, 540

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[4] Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing Is Presumptive, but "Totality" Is Determinative*, 45 HOUS. L. REV. 901, 928-33 (2008) (Part VI. "The Debtor's Ability to Pay Under a Chapter 13 Plan") ("B. Reasons that Projected Disposable Income Is Forward-Looking and Not Based on a Multiplier of Disposable Income").

U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted)), or "a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (quoting *Griffin*, 458 U.S. at 571 (1982)) (alteration in original). In addition, this approach relies on 11 U.S.C. § 105(a), which grants the bankruptcy court the authority to "issue any order, process or judgment that is necessary or appropriate *to carry out the provisions of this title*." (emphasis added). Thus, the situation in which the debtor's actual anticipated income and expenses during the plan period are likely to differ significantly from the figures on Form 22C, in a manner showing substantial amounts available to repay the general unsecured creditors, constitutes a fitting example of when it would be nonsensical to restrict the power of the bankruptcy court under 11 U.S.C. § 105(a) to determine "projected disposable income" in the confirmation process. Such a result would deny Chapter 13 plan confirmation to debtors who have the actual ability and are willing to repay their creditors, and it would produce an absurd result that is obviously antithetical to Congress' intent to avoid bankruptcy abuse, to ensure that debtors pay their creditors the most that they can afford, and to shift can-pay debtors to a Chapter 13 repayment plan.

The facts in the proceedings below provide an excellent example. In these circumstances, applying the mechanical/multiplier approach asserted by the Petitioner (Chapter 13 Trustee) would produce a result that Petitioner has admitted the debtor could not afford based on her actual monthly disposable income because her "current monthly income," as defined in 11 U.S.C. §101(10A), was inflated due to

the buyout by debtor's ex-employer during the six-month pre-filing period. *In re Lanning*, 545 F.3d at 1272. However, the debtor proposed a plan that she could afford, which was to make monthly payments of $144 to the general unsecured creditors over a 60-month period, and which the court confirmed over the Petitioner's objection.

In these circumstances, applying the mechanical/multiplier approach to deny confirmation of the debtor's Chapter 13 plan is both absurd and clearly contrary to the intent of Congress because, as stated by the Tenth Circuit, "the mechanical approach advocated by the Trustee would effectively foreclose bankruptcy protection to debtors like Mrs. Lanning . . .", *In re Lanning* 545 F.3d at 1281, who have the actual ability and desire to repay substantial amounts to the their creditors under a Chapter 13 plan. It also would harm creditors by thwarting the attempt by honest debtors to repay creditors the maximum they can afford. However, by using its statutory and equitable powers under 11 U.S.C. § 105(a), the court may determine the debtor's actual ability to pay and thus rule on confirmation of the debtor's plan based on real income and expenses, rather than numbers that are inaccurate and irrelevant. *See Young v. United States*, 535 U.S. 43, 50 (2002) ("[B]ankruptcy courts . . . are courts of equity and apply the principles and rules of equity jurisprudence." (internal quotation marks omitted)).

Thus, "the non-presumptive starting point approach" uses the debtor's "current monthly income" and the means test expenses (for an above-median debtor) as a starting point, thereby giving initial deference to Congress' definition of "disposable income" in 11 U.S.C. § 1325(b)(2)-(3), but it adjusts when the debtor's

income or expenses during the plan period are likely to be significantly different from her income or expenses during the pre-filing period. And it does so without the need to imply a presumption that Congress did not intend.

ARGUMENT

I. Using a Forward-Looking Approach Is Consistent with Both the Language of the Statute and the Legislative History.

A. "Projected Disposable Income" Is a Forward-Looking Term, as Are Many Related Phrases in the Bankruptcy Code.

It is noteworthy that *Merriam-Webster's Collegiate Dictionary* 993 (11th ed. 2003) defines the verb *project* as follows: "to plan, figure, or estimate for the future (~ expenditures for the coming year)." *Black's Law Dictionary* (8th ed. 2004) does not define "project." Thus, the Eighth Circuit Court of Appeals recently explained that "a distinction can be drawn between a debtor's 'disposable income,' which is calculated solely on the basis of historical numbers and regional averages, and a debtor's 'projected disposable income,' which necessarily contemplates a forward-looking number." *In re Frederickson*, 545 F.3d 652, 659 (8th Cir. 2008) *cert. denied*, 129 S.Ct 1630 (2009).

In this regard, the United States Supreme Court requires that courts give meaning to every word in a statute, *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993). As it stated in *TWR, Inc. v. Andrews*, 534 U.S. 19, 31 (2001), "It is a cardinal principal of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous,

void, or insignificant" (internal quotations omitted). The Supreme Court also has emphasized that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (quoting *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)). Therefore, "projected disposable income" cannot mean the same as "disposable income" because the word "projected" would be superfluous. As one bankruptcy court pointed out, "Congress' choice to use both 'projected disposable income' and 'disposable income' in the Code indicates an intent to apply different meanings to the two terms. Given this, it is common sense that while 'disposable income' may explicitly refer to the past, 'projected disposable income' undeniably looks to the future." *In re Slusher*, 359 B.R. 290, 297 (Bankr. D. Nev. 2007). In agreement, the court in *In re Jass*, 340 B.R. 411, 415-16 (Bankr. D. Utah 2006) reasoned as follows: "By placing the word 'projected' next to 'disposable income' in § 1325(b)(1)(B), Congress modified the import of 'disposable income.' The significance of the word 'projected' is that it requires the court to consider both future and historical finances of a debtor in determining compliance with § 1325(b)(1)(B)." Therefore, a starting point approach correctly interprets "projected disposable income" as being intended by Congress to refer to the debtor's actual income and expenses during the plan period if those figures have changed significantly.

Also, each of the following three phrases in 11 U.S.C. § 1325(b)(1)(B) is consistent with a starting point approach's forward-looking interpretation of "projected." The first phrase is "*as of the effective date of the plan*" (emphasis added), which generally refers to "the date the order of confirmation becomes

final," and not the date that the Chapter 13 petition was filed. 8 *Collier on Bankruptcy* ¶ 1325.05[2][a] (15th ed. rev. 2009). Hence this phrase is forward looking. The second phrase is "all of the debtor's projected disposable income *to be received* in the applicable commitment period" (emphasis added). Clearly this phrase refers to the disposable income that will be received by the debtor in the future. The third phrase is "*will be applied* to make payments to unsecured creditors under the plan" (emphasis added). Undoubtedly, the verb "will be applied" is in the future tense. Moreover, the Tenth Circuit noted that the courts using the mechanical/multiplier approach pay little attention to these three phrases, thereby apparently rendering them superfluous. *In re Lanning*, 545 F.3d at 1279.

In addition, the following Chapter 13 provisions relating to the debtor's future earnings are consistent with a starting point approach's forward-looking interpretation of "projected." Under 11 U.S.C. § 1306(a)(2), earnings from services that the debtor performs post-petition are included in property of the bankruptcy estate. And under 11 U.S.C. § 1322(a)(1), one of the mandatory requirements of a Chapter 13 plan is "the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." In discussing these two forward-looking provisions, one bankruptcy judge eloquently summarized the problem created by the poorly drafted legislation concerning "projected disposable income" as follows:

> The chapter 13 "disposable income" objection-to-confirmation problem is a classic paradox. The emphasis in §§ 101(10A) and 1325(b) on histori-

> cal income as the threshold for confirming a chapter 13 plan over an objection contradicts the basic premise embodied in §§ 1306(a) and 1322(a)(1) that chapter 13 plans are funded by future income that really exists and runs counter to the only thing that appears to be unambiguous about the 2005 consumer amendments to the Bankruptcy Code: the policy that more debtors should be diverted from chapter 7 liquidations to chapter 13 repayment plans.

In re Pak, 378 B.R. 257, 268 (B.A.P. 9th Cir. 2007) (Klein, J., concurring).

Finally, 11 U.S.C. § 521(a)(1)(B)(vi) requires the debtor to file "a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition."[5] This provision, too, is consistent with a starting point approach's forward-looking interpretation of "projected."

The crux of the problem is that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was drafted egregiously. Congress surely intended that the new definition of "disposable income" would work in the overwhelming majority of cases and thereby create greater consistency among the bankruptcy courts in confirming Chapter 13 plans and ensuring that debtors repay the maximum they can afford. While sometimes it does accurately

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[5] Note that this provision covers only "any reasonably anticipated increase in income or expenditures," but not reasonably anticipated decreases. It has been suggested that this omission can be cured by enacting a technical amendment covering any reasonably anticipated decrease in income or expenditures. Waxman & Rucki, *Chapter 7 Bankruptcy Abuse*, 45 HOUS. L. REV. at 933 n.150 (2008).

represent the debtor's actual income and expenses during the applicable commitment period, in many other cases it is not an accurate predictor because it is based on historical income and expenses that might have changed significantly. And when it is not an accurate predictor, these poorly drafted definitions of "disposable income," "current monthly income," and the means test expenses often produce absurd results that dramatically conflict with the intentions of Congress. Several good examples are when the debtor has lost employment, has obtained a more lucrative job, has stopped receiving substantial workers' compensation benefits, has surrendered or intends to surrender collateral that cancels a secured debt, has suffered additional medical expenses; or when the debtor will complete repayment of a 401(k) loan in the early months of a Chapter 13 plan; or when Form 22C shows a negative disposable income figure but the debtor's actual income minus actual expenses shows actual substantial disposable income that will benefit the general unsecured creditors. In all of these situations, applying a forward-looking approach allows the court to confirm a Chapter 13 plan providing for the repayment to creditors of the maximum the debtor can afford.

In applying a forward-looking approach, the Eighth Circuit Court of Appeals explained: "If we read the word 'projected' out of 11 U.S.C. § 1325(b)(1)(B) and rely solely on the calculation of 'disposable income' on Form 22C, the outcome involves anomalous, and perhaps even absurd, results." *In re Frederickson*, 545 F.3d at 659.

B. Calculating "Projected Disposable Income" Based on Income and Expense Figures That Are Significantly Different from the Debtor's Anticipated Income or Expenses During the Plan Period Often Leads to Absurd Results.

Measuring ability to pay by income or expense figures that are *no longer relevant* is absurd and in clear contravention of Congress' stated goals. Accordingly, this brief agrees with the partial quotation, in the Brief For The National Association of Consumer Bankruptcy Attorneys as *Amicus Curiae* in support of Neither Party at 27, from *Kelly v. Washington*, 479 U.S. 36, 43 (1986), which states in full: "But the text is only the *starting point* (emphasis added). As Justice O'CONNOR explained last Term: 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (citations omitted).

Given the object and policy of ensuring that debtors repay the maximum they can afford under a Chapter 13 plan, which under any intelligible design must be based on the debtor's future expected actual income minus actual expenses, resorting instead to historical artificially determined income and expenses that differ significantly is patently absurd. In fact, it might be considered the classic example of "absurd" in the context of bankruptcy law. By definition, it is impossible to determine the debtor's ability to make Chapter 13 plan payments during the next 60 months based on income and expenses figures that are not accurate predictors of the debtor's actual future budget. Not only is this result absurd, it penalizes honest debtors and harms general un-

secured creditors, who will not be paid if a Chapter 13 plan is not confirmed. It not only is clearly at odds with the goals of BAPCPA but also with the primary goal of the bankruptcy laws throughout history, which is to give the honest debtor a fresh start. In this regard, the Honorable W. Homer Drake, Jr., wrote: "The bankruptcy laws have been described as humane by a no less prestigious institution than the Supreme Court of the United States, because these laws are designed to benefit both honest debtors and their creditors." W. Homer Drake, Jr., "*Bankruptcy Practice For the General Practitioner*, 3d ed., Vol. 1, § 1:1 (Thomson West 2002) (citing *Local Loan v. Hunt*, 292 U.S. 234 (1934); *Stellwagon v. Clum*, 245 U.S. 605 (1918)). Unfortunately, a backward-looking interpretation of "projected disposable income" has the opposite effect on both debtors and creditors, which is truly an absurd result. The court in *In re Spurgeon* opined:

> The court also cannot ignore the purpose of the statutes. Why did Congress make the expense provisions of the Chapter 7 means test part of the disposable income test in chapter 13 cases? Congress was concerned with the deductible expenses of chapter 13 debtors with income above the family median. Congress wanted to prevent them from claiming and prevent the courts from allowing higher expense deductions than Congress thought appropriate. By keeping down deductions, Congress meant to increase disposable income and thereby increase the plan payments on general unsecured claims. The statutes will have the opposite effect if the deduction statute must be applied without regard to fact changes brought about by the chapter 13 case. That result would be absurd.

In re Spurgeon, 378 B.R. 197, 203 (Bankr. E.D. Tenn. 2007) (citing *In re Gress*, 344 B.R. 919 (Bankr. W.D. Mo. 2006).

Other courts agree, and the opinion in *In re Wilson*, 397 B.R. 299, 311 (Bankr. M.D.N.C. 2008) sets forth several cases that view the mechanical/multiplier approach as producing an absurd result. For example, the Tenth Circuit in the proceedings below highlighted the bankruptcy court's reasoning that the mechanical/multiplier approach "leads to absurd results that are at odds with both congressional purpose and common sense." *In re Lanning*, 545 F.3d at 1273. Similarly, the bankruptcy court in *In re Purdy*, 373 B.R. 142, 150 (Bankr. N.D. Fla. 2007), stated: "The purportedly 'literal' application of the statutory language advocated by the 'multiplier' interpretation is at odds with the manifest intent of Congress. . . .[and] produces an absurd result." Another example is *In re Edmondson*, 363 B.R. 212, 217 (Bankr. D.N.M. 2007), in which the court concluded: "Here, it appears that taking a plain meaning approach which results in strict adherence to Form [ ]22C would be contrary to the structure and purpose of the Bankruptcy Code as a whole and would lead to absurd results."

C. Examples of Avoiding Absurd Results by Applying a Forward-Looking Approach

The Supreme Court has stated unambiguously: "It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. Thus, in accordance with the Court's guidance, the majority of courts have applied a forward-looking

approach to "projected disposable income" to avoid an absurd result.

For example, in the case of *In re Johnson*, the debtors' "current monthly income" was artificially inflated due to workers' compensation payments to the wife for a hand injury during the six-month period before bankruptcy. The payments had ended prior to the bankruptcy filing. The Trustee objected to confirmation of the debtors' Chapter 13 plan solely because of the inflated "current monthly income" figure on Form 22C, even though the plan proposed to pay $162,000 to the general unsecured creditors, which constituted 73% of their claims. The bankruptcy court applied a forward-looking approach and confirmed the plan based on the debtors' amended Form 22C, using anticipated actual income and expenses during the plan period, while adhering to the changes in the income inclusions and exclusions in 11 U.S.C. § 101(10A). The case currently is pending in the Seventh Circuit Court of Appeals. *In re Johnson*, 400 B.R. 639, 643, 651 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009).

In a case involving the expense side, the multiplier approach would have allowed deductions for monthly loan repayments of $1134.79 to the debtor's 401(k) plan even though the loan would have been completely repaid in the twenty-fourth month of the sixty-month Chapter 13 plan. The bankruptcy court posed the hypothetical of a situation in which the debtor has only one monthly payment remaining on a 401(k) loan at the time she filed her Chapter 13 sixty-month plan. The court stated that it would "defy[] logic" if, "[s]tarting in the second month of the plan, a debtor would be able to pocket the amount of the

401(k) loan repayment free from the Chapter 13 plan and any claims of her prepetition creditors." The court denied confirmation of the plan, and the Fifth Circuit affirmed. *In re Nowlin*, 366 B.R. 670, 675 (Bankr. S.D. Tex 2007), *aff'd sub nom. Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258 (5th Cir. 2009).

In another case on the expense side, *In re Turner*, an above-median debtor deducted on Form 22C the monthly mortgage payment of $1521 for his residence, which he intended to surrender to the mortgagee, and which would result in the cancellation of the debt before he would be required to make any payments to the unsecured creditors under a confirmed Chapter 13 plan. *In re Turner*, 574 F.3d 349 (7th Cir. 2009). In the context of a Chapter 7 case, the overwhelming majority of courts have held that this means test expense for "all amounts scheduled as contractually due to secured creditors" is deductible even if the debtor intends to surrender the collateral to the secured creditor. 11 U.S.C. § 707(b)(2)(A)(iii)(I); *In re Kelvie*, 372 B.R. 56, 61 (Bankr. D. Idaho 2007) (citing *In re Haman*, 366 B.R. 307, 316 (Bankr. D. Del. 2007). However, in a Chapter 13 case in which the debtor has surrendered or intends to surrender the collateral to the secured creditor in cancellation of the debt, it would be absurd to allow a deduction of the home mortgage payments for the purpose of determining the debtor's "disposable income" because the expense is neither reasonable nor necessary and such payments will never "be expended." Therefore, "[m]ost courts have not allowed the deduction in Chapter 13 cases when the proposed plan provided for surrender of the collateral." *In re Spurgeon*, 378 B.R. 197, 201 (Bankr. E.D. Tenn. 2007). However in the *Turner* case, the bankruptcy court used the multiplier approach and confirmed the plan, but the

Seventh Circuit Court of Appeals, adopting the presumptive starting point approach, reversed based on the following rationale:

> A fixed *debt* that will disappear: the deduction of mortgage expense from the Chapter 13 debtor's disposable income is not intended to enrich the debtor at the expense of his unsecured creditors. It is intended to adjust the respective rights of a secured creditor—the mortgagee—and the unsecured creditors. Turner wants to use a *phantom* deduction to reduce the recovery by his unsecured creditors without benefiting any other creditor.

In re Turner, 574 F.3d at 356.

Similarly, in *In re Vernon*, the court denied a deduction for secured debt payments on surrendered property and explained the different policy goals of applying the means test as a presumption of abuse in Chapter 7 versus using the means test deductions in Chapter 13 "to determine the maximum a debtor could pay under a Chapter 13 plan." *In re Vernon*, 385 B.R. 342, 347 (Bankr. M.D. Fla. 2008), *aff'd*, No. 2:08-cv-280, (M.D. Fla. Aug. 3, 2009) (citations omitted). Yet, Form 22C provides for the monthly secured debt deduction over the plan period even when it will never be paid.

In this regard, it is noteworthy that Senator Charles Grassley, the sponsor of BAPCPA, stated the following in a United States Senate hearing:

> [T]he federal courts produced a bankruptcy form [22C][6] that is supposed to measure repayment

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[6] Official Bankruptcy Form 22C is a "Statement of Current Monthly Income and Calculation of Commitment Period and

> ability. But it's my understanding that this form actually directs consumers to claim deductions for expenses a debtor may not even have. That certainly wasn't the intent of the law. The form legitimizes gaming of the law, reduces the integrity of the system, and ultimately undermines the reforms we were trying to accomplish.[7]

Consequently, in many instances, the result under the multiplier approach will thwart Congress' goal of ensuring that debtors who actually have the ability to repay creditors do so in a Chapter 13 repayment plan.

D. The Legislative History Shows Congress' Intent to Prevent Bankruptcy Abuse and Ensure That Debtors Repay Creditors the Maximum They Can Afford, and Congress Never Intended to Abrogate All Judicial Authority Concerning the Determination of "Projected Disposable Income."

Among the primary purposes of BAPCPA were the following: (1) to prevent bankruptcy abuse; (2) "to ensure that debtors repay creditors the maximum they can afford," H.R. REP. NO. 109-31, pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89; and (3) to shift can-pay debtors to Chapter 13 based on their actual ability to pay. In this regard, the First Circuit Court of Appeals recently stated: "The Bank-

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Disposable Income" that must be completed by every Chapter 13 debtor.

[7] Prepared Statement of Senator Chuck Grassley, Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act (Dec. 7, 2006), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9560.

ruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA') was enacted in response to an upward trend in consumer bankruptcy filings and concerns that bankruptcy relief was 'too readily available' and 'sometimes used as a first resort, rather than a last resort.'" *In re Rudler*, 576 F.3d 37, 40 (1st Cir. 2009) (quoting H.R. REP. NO. 109-31, pt. 1, at 4, reprinted in 2005 U.S.C.C.A.N. 88, 90).[8] More specifically, Senator Charles Grassley explained in the legislative history of BAPCPA:

> What we are trying to do is fix a bankruptcy system that has gone awry, where individuals who have the ability to repay their debts don't do so, and the rest of us are left holding the bag.
>
> What we have tried to do with this bill is inject some fairness into the system, whereby people who have assets and the ability to repay back their debts go into a chapter 13 repayment plan, and people who do not have any means and no ability to repay go into chapter 7.

151 CONG. REC. S2469 (daily ed. Mar. 10, 2005) (statement of Sen. Grassley).

Consequently, a forward-looking approach that gives initial deference to Congress' new definition of "disposable income," but adjusts when the debtor's actual income or expenses are likely to be different during the plan period, most effectively carries out the intentions of Congress.

This brief does not dispute that, in implementing these stated policies, Congress attempted to create a

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[8] *Morse v. Rudler* (*In re Rudler*), 576 F.3d 37, 40 (1st Cir. 2009) (quoting H.R. REP. NO. 109-31, pt. 1, at 4, *reprinted in* 2005 U.S.C.C.A.N. 88, 90).

mathematical formula to determine "disposable income" that would result in greater uniformity among the bankruptcy judges in confirming Chapter 13 plans.[9] Thus, in cases where "current monthly income" minus the means test expenses approximates the debtor's actual income and expenses during the plan period, the bankruptcy court's discretion is reduced innocuously. However, Congress never intended to abrogate entirely the discretion of the bankruptcy court to determine the debtor's ability to repay creditors under a Chapter 13 plan. Therefore, in circumstances in which the debtor's actual income or expenses are likely to differ significantly during the plan period, the multiplier approach often produces absurd results that are in conflict with the stated goals of BAPCA. In this regard, the Supreme Court has instructed as follows: "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin*, 458 U.S. at 575. Thus, a starting point approach, supported by all of the relevant forward-looking provisions, provides an alternative interpretation that is consistent with the legislative purposes. Moreover, 11 U.S.C. § 105(a) provides the court with the power "to carry out the provisions of [the Bankruptcy Code]", which includes the power to reconcile the backward-looking and forward-looking provisions of 11 U.S.C. § 1325(b) in order to confirm Chapter 13 plans in situations where the debtor has substantial

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[9] *See* Petitioner's brief at 29 quoting the following excerpt from Senator Grassley's insertion into the Congressional Record in 2000 that "[i]t is intended that there be a uniform, nationwide standard to determine disposable income used in chapter 13 cases based, on means test calculations." 146 CONG. REC. S11,703 (2000).

actual disposable income to pay to the general unsecured creditors. Any other conclusion would fly in the face of the legislative intent to "inject some fairness into the system, whereby people who have assets and the ability to repay back their debts go into a chapter 13 repayment plan." 151 CONG. REC. S2469 (daily ed. Mar. 10, 2005) (statement of Sen. Grassley).

In this context, Petitioner-Trustee's brief at 28 in this case quotes a sentence that is helpful from the 1999 Senate Judiciary Committee Report (portions of which were inserted into the Congressional Record) accompanying the 2000 (unenacted) Act:[10]

> HR 2415 is the culmination of these efforts and is intended to both remove unequivocally the bankruptcy court's discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and to restrict as much as possible reliance upon judicial discretion to determine the debtor's ability to pay.

146 CONG. REC. S11,700 (2000) (Statement of Sen. Grassley).

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[10] "146 CONG. REC. 26,462 (2000). The 1999 Senate Judiciary Committee Report originally accompanied the unenacted Bankruptcy Reform Act of 1999. During the Senate's debate on the Bankruptcy Reform Act of 2000 Conference Report, Senator Grassley inserted portions of the 1999 Senate Judiciary Committee Report into the Congressional Record to provide an explanation of the 2000 Conference Report. The text of these insertions appears in the Congressional Record as seven-point font, rather than the standard eight-point font, indicating that they were contained in a document inserted into the Congressional Record by Senator Grassley. LAWS AND RULES FOR PUBLICATION OF THE CONGRESSIONAL RECORD, available at http://www.gpoaccess.gov/crecord/laws-rules.pdf."

Waxman & Rucki, "*Chapter 7 Bankruptcy Abuse*," 45 HOUS. L. REV. at 910 n.44.

While, for purposes of the means test presumption in a Chapter 7 case, the bankruptcy court's discretion has been removed (although, if the presumption does not exist or is rebutted, the court is required in its discretion to consider whether the totality of the circumstances demonstrates abuse of Chapter 7 under 11 U.S.C. § 707(b)(3)(B)).

However, the language quoted above concerning the court's discretion to determine the debtor's ability to pay necessarily is referring to a Chapter 13 plan, and that judicial discretion is "*restrict[ed] as much as possible*." 146 CONG. REC. S11,700 (2000) (insertions by Sen. Grassley) (emphasis added). Therefore, this excerpt from the legislative history is completely consistent with a forward-looking approach that, in computing "disposable income," starts with current monthly income and the means test expenses but adjusts when that is *not possible* to determine the debtor's ability to pay because the debtor's income or expenses during the plan period are likely to differ significantly.

II. A Starting Point Approach Should Not be Based on a Presumption that Congress Never Intended.

The starting point approach applied by the Tenth Circuit in the proceedings below generally is described as reading a presumption into 11 U.S.C. § 1325(b) even though Congress did not include an express presumption in the literal language of the statute.[11] However, "it is a general principle of statu-

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[11] *See Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258, 263 (5th Cir. 2009); *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269, 1282 (10th Cir. 2008), *cert. granted*, 130 S. Ct. 487 (2009) (No. 08-998); *In re Slusher*, 359 B.R. 290, 299–300 (Bankr. D. Nev. 2007); *In re Jass*, 340 B.R. 411, 418–19 (Bankr. D. Utah 2006).

tory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Inasmuch as Congress used the word "presume" in 11 U.S.C. § 707(b)(2)(A)(i) to create an express presumption of abuse under the means test, but did not use the word "presume" or "presumption" in 11 U.S.C. § 1325(b) for the definition of "disposable income," it is clear that an express presumption does not exist for the latter. In agreement, the Ninth Circuit Court of Appeals stated: "BAPCPA's changes to the Bankruptcy Code made it clear that Congress knows how to create a presumption. *See* 11 U.S.C.A. § 707(b)(2) (stating when the court shall presume abuse exists). Congress could have included a presumption in § 1325(b)(1)-(2), but it did not." *Maney v. Kagenveama (In re Kagenveama)*, 527 F.3d 990, 997 (9th Cir. 2008), *amended by In re Kagenveama*, 541 F.3d 868, 874 (2008).

The next logical question is the following: Did Congress intend to create an implied presumption in 11 U.S.C. § 1325(b) that "a debtor's 'disposable income' calculated under 11 U.S.C. § 1325(b)(2) and multiplied by the applicable commitment period is presumptively the debtor's 'projected disposable income' under 11 U.S.C. § 1325(b)(1)(B)," unless it is rebutted by evidence of significant changes in the debtor's present or future actual income or reasonably necessary expenses? *In re Nowlin*, 576 F.3d at 266. Many post-BAPCPA cases and commentaries, including the Eighth Circuit Court of Appeals in *In re Frederickson*, express the notion that

Congress intended to create a rigid mathematical formula for disposable income, thereby "reduc[ing] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses." *In re Frederickson*, 545 F.3d 652, 658 (8th Cir. 2008) (citing Richard S. Stolker, *Debtor's Perspective: BAPCPA Issues*, 40 MD. B.J. 22, 23 (2007)), *cert. denied*, 129 S. Ct. 1630 (2009). In this regard, although Judge Wedoff refers to the starting point approach as "the presumptive approach" in the caption to Part 3.b of the bankruptcy court's opinion in *In re Johnson*, he also states the following: "The primary problem with the presumptive approach is the statutory language. Nothing in § 1325(b) *creates or implies* a presumption of correctness in the average income from the six months before bankruptcy." *In re Johnson*, 400 B.R. 639, 648 (Bankr. N.D. Ill. 2009), *appeal docketed sub nom. Marshall v. Johnson*, No. 09-1212 (7th Cir. Jan. 29, 2009) (emphasis added). Even the Tenth Circuit Court of Appeals, in applying the presumptive starting point approach, acknowledged the problem of implying a presumption when it stated: "We think that these textual problems [relating to the multiplier approach giving little heed to 'as of the effective date of the plan,' 'to be received in the applicable commitment period,' and 'will be applied to make payments'] . . . outweigh the concern about implying a presumption." *In re Lanning*, 545 F.3d at 1279. As explained below, implying a presumption is unnecessary and misguided, and the same result can be achieved based on two other sound legal theories.

III. The Supreme Court's Two Exceptions to the "Plain Meaning" Rule

Therefore, instead of attempting to imply a presumption that Congress obviously did not intend, the courts using a starting point approach to determine "projected disposable income" should rely on the Supreme Court's guidelines for statutory interpretation. More specifically, the Supreme Court consistently has recognized two exceptions to the general rule of applying the plain meaning of a statute. One exception is when a literal application will produce an absurd result. As the Court stated in *Lamie v. United States Trustee*, "[i]t is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534 (quoting *Hartford Underwriters*, 530 U.S. at 6). The other exception is "in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin*, 458 U.S. at 571).

With respect to 11 U.S.C. § 1325(b), both exceptions apply because its literal language often produces absurd results that blatantly conflict with the intentions of Congress to reduce bankruptcy abuse and "ensure that debtors repay creditors the maximum they can afford." H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89. The fact that there are now six differing approaches to "projected disposable income" that have ensued from the amendments to 11 U.S.C. § 1325(b) in 2005 con-

stitute incontrovertible evidence that the new definition of "disposable income" and the absence of a definition for "projected disposable income" exemplify the rare case in which the intention of Congress, rather than the strict language of the statute, should control. The language is *irreconcilable* because "the term 'disposable income' demands a look back and the term 'projected' requires a look forward . . . . One must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both." *In re Lanning*, 380 B.R. 17, 23 (B.A.P. 10th Cir. 2007). Thus, when "disposable income" does not accurately reflect the debtor's actual income or expenses, courts should apply a forward-looking approach that utilizes the exception enunciated by the Supreme Court to avoid an absurd or anomalous result that never was intended by Congress.[12] Courts should not attempt to utilize a phantom presumption that was neither expressed nor implied. Rather, courts should follow the Supreme Court's guidance in *Griffin* in order to avoid an interpretation of the statute that produces absurd

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[12] Thomas J. Izzo, Comment, *Projecting the Past: How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 EMORY BANKR. DEV. J. 521, 543 (2009) ("While the Starting Point interpretation produces balanced and reasonable outcomes, the Mere Multiplication construction has the tendency to produce absurd results that are contrary to a sensible bankruptcy system."); Matthew Showel, Student Article, *Calculating Projected Disposable Income of an Above-Median Chapter 13 Debtor*, 21 LOY. CONSUMER L. REV. 407, 427-28 (2009) ("It is not reasonable to interpret the statute in a way that leads to nonsensical, counterproductive results when an interpretation that is at least as viable is available. Such a reading suggests that Congress intended nonsense when enacting the statu[t]e. That is not a reasonable supposition.").

results if there exist other interpretations consistent with Congress' intent. *Griffin*, 458 U.S. at 575.

IV. The Bankruptcy Court's Power Under 11 U.S.C. § 105(a)

Bankruptcy Code § 105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title.*" 11 U.S.C. § 105(a) (emphasis added). This broad grant of authority to the court is another sound legal basis on which a bankruptcy judge may use the non-presumptive starting point approach to rule on the confirmation of a debtor's Chapter 13 plan, while also reconciling the conflicting forward-looking and backward-looking provisions of § 1325(b) when the debtor's income or expenses during the plan period are likely to be significantly different from her income or expenses during the pre-filing period.

The Third Circuit emphasized:

> The Supreme Court has long recognized that bankruptcy courts are equitable tribunals that apply equitable principles in the administration of bankruptcy proceedings. . . . The enactment of the [Bankruptcy] Code in 1978 . . . did not alter bankruptcy courts' fundamental nature. . . . Any lingering doubt on that point is dispelled by a string of post-enactment Supreme Court decisions . . . and by the Code itself. *See* 11 U.S.C. § 105(a).

Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 567 (3d Cir. 2003) (citation omitted); *see Young v. United States*, 535 U.S. 43, 50 (2002) ("[B]ankruptcy courts . . . are courts of equity and apply the principles and rules of equity jurisprudence." (internal quotation marks omitted)).

However, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). As explained by the First Circuit Court of Appeals: "[S]ection 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code." *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 283 F.3d 392, 403 (1st Cir. 2002).

Therefore, inasmuch as the right of an individual who is eligible under 11 U.S.C. § 109(e)[13] to seek Chapter 13 relief is an identifiable right conferred within the Bankruptcy Code, it is evident that 11 U.S.C. § 105(a) provides the bankruptcy court with the appropriate power to apply the non-presumptive starting point approach and thereby reconcile the conflicting language in 11 U.S.C. § 1325(b) concerning confirmation of a debtor's Chapter 13 plan.

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[13] Section 109(e) provides as follows:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $336,900 and noncontingent, liquidated, secured debts of less than $1,010,650, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $336,900 and noncontingent, liquidated, secured debts of less than $1,010,650 may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e) (2009).

This express power that Congress has conferred on the bankruptcy court under 11 U.S.C. § 105(a), as well as the Supreme Court's two exceptions to the plain language principle of statutory interpretation, enable the court to apply a starting point approach without resorting to the machination of an implied presumption that Congress did not intend. Therefore, when the debtor's income or expenses during the plan period are likely to be significantly different from her income or expenses during the pre-filing period, applying the non-presumptive starting point approach is the most appropriate course of judicial action for the following reasons. Using its express statutory power under 11 U.S.C. § 105(a) and its inherent power as a court of equity, the bankruptcy court will carry out the applicable Bankruptcy Code provisions in a manner that avoids an absurd result or a result that is "demonstrably at odds with the intentions of its drafters," *United States v. Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin*, 458 U.S. at 571), which undeniably are "to ensure that debtors repay creditors the maximum they can afford." H.R. REP. NO. 109-31, pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89.

V. Excusal from Filing Schedule I, and Resetting the Six-Month Period to Determine "Current Monthly Income" Is Not an Exclusive Approach

Bankruptcy Code § 101(10A)(A)(ii) allows the court the discretion to reset the six-month period for the determination of current monthly income if the debtor does not file Schedule I. In this regard, it is important to note that 11 U.S.C. § 521(a)(1)(B)(ii) requires the debtor to file a schedule of current income (Schedule I) and a schedule of current ex-

penses (Schedule J), "unless the court orders otherwise." Under 11 U.S.C. § 101(10A)(A)(ii), the reset six-month period ends on "the date on which current income is determined by the court," instead of "on the last day of the calendar month immediately preceding the date of the commencement of the case" (the norm). 11 U.S.C. § 101(10A)(A)(i). It appears to be used very infrequently and in circumstances involving a dramatic change in the debtor's income, such as the loss of a job shortly before or after the filing of the bankruptcy petition. This provision may work only in favor of the debtor, and it involves only the income component of disposable income.

Generally, the debtor files a motion to excuse the requirement for filing Schedule I, and to set an alternative date for determining current monthly income. *See In re* Hoff, 402 B.R. 683, 685 (Bankr. E.D.N.C. 2009).[14] For example, in two recent Chapter 13 cases, the debtors lost their jobs shortly before bankruptcy resulting in a significant loss in income, and both were receiving unemployment benefits at the time of their motions to reset the six-month period for calculating current monthly income. *In re Dunford*, 408 B.R. 489, 491-92 (Bankr. N.D. Ill. 2009); *In re Hoff*, 402 B.R. at 685 (The husband and wife were joint debtors. The husband lost his job, and the wife was unemployed. *Id.*). In both cases, the courts found

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[14] Section 521(i)(1) states that "if an individual debtor in a voluntary case under chapter 7 or 13 fails to file [schedules I and J] required under [11 U.S.C. § 521(a)(1)(B)(ii)] within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition." 11 U.S.C. § 521(i)(1). However, this requirement is qualified by the language "unless the court orders otherwise." 11 U.S.C. § 521(a)(1)(B).

that the motion was filed in good faith based on such factors as the debtors' financial situation, education, experience, initiative in seeking employment, and the particular six-month period requested for determining current monthly income. *In re Dunford*, 408 B.R. at 496; *In re Hoff*, 402 B.R. at 685-87. Also, in both cases, the courts excused the filing of Schedule I and reset the six-month period for determining the debtors' current monthly income. *In re Dunford*, 408 B.R. at 497 (resetting the period by two months, as requested by the debtor); *In re Hoff*, 402 B.R. at 687 (resetting the period by four months, but not six months as the debtors had requested).

As a practical matter, it is helpful to note that 11 U.S.C. § 1324(b) requires the confirmation hearing to be held not later than 45 days after the date of the meeting of creditors under 11 U.S.C. § 341(a).[15] Also, Federal Rule of Bankruptcy Procedure 2003(a) requires that the meeting of creditors in a Chapter 13 case be held not later than 50 days after the order for relief. Fed. R. Bankr. P. 2003(a).

Inasmuch as these time limitations are quite restrictive, and inasmuch as this approach to calculating "projected disposable income" does not cover

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[15] [T]he language of section 1324(b) should be read to require only that the confirmation hearing be commenced within the deadline stated. There will be occasions on which the court cannot finish the hearing on the same day, or a proceeding to determine the amount of a claim must first be resolved, or a person necessary to the hearing is ill, and there is no reason for a rigid rule that would prevent the court from continuing the hearing to a later date.

8 COLLIER ON BANKRUPTCY, ¶ 1324.02[2] (15th ed. rev. 2009).

significant changes in the debtor's expenses,[16] it seems clear that resetting the six-month period to determine the debtor's "current monthly income" cannot possibly cover as many situations as a forward-looking approach. More specifically, the overwhelming weight of authority applies a forward-looking approach that takes into account likely changes in actual income *or* expenses during the plan period, rather than only the debtor's income during the reset six-month period. These courts implicitly have not construed 11 U.S.C. § 101(10A)(A)(ii) as the exclusive method by which the court may apply income figures that more accurately represent the debtor's actual future income than the average monthly income for the six months prior to bankruptcy in order to determine "projected disposable income." *But see In re Dunford*, 408 B.R. at 495 (Bankr. N.D. Ill. 2009)

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[16] Petitioner's brief at 54 asserts that, under the multiplier approach, there is a possible exception on the expense side when it can be demonstrated that there are "special circumstances" that could rebut the means test presumption of abuse in Chapter 7 (e.g., a serious medical condition) "that justify *additional* expenses . . . for which there is no reasonable alternative." 11 U.S.C. § 707(b)(2)(B) (which is incorporated into the expense component of "disposable income" by 11 U.S.C. § 1325(b)(3) for an above-median debtor) (emphasis added). However, the major problem with applying the "special circumstances" provision in a Chapter 13 case is that it does not cover decreased expenses, such as when the debtor has surrendered or intends to surrender the collateral in cancellation of the debt that it secures, or when the debtor will complete repayment of a 401(k) loan in the early months of a Chapter 13 plan. Thus, in many instances, the "special circumstances" provision cannot be applied to avoid a gross overstatement of the debtor's actual expenses during the Chapter 13 plan period, thereby rendering the plan not confirmable even though the debtor has substantial actual disposable income available to pay the general unsecured creditors.

(favoring the interpretation that resetting the six-month period is exclusive). This brief expressly asserts that this approach is not the exclusive method and that the effect of treating it as exclusive in many instances would be to thwart Congress' intent to shift can-pay debtors to a Chapter 13 repayment plan.

CONCLUSION

In calculating the debtor's "projected disposable income" during the Chapter 13 plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period. This conclusion is supported by the forward-looking nature of the word "projected" as well as many other forward-looking phrases in the Bankruptcy Code concerning Chapter 13 plan confirmation. Furthermore, a backward-looking approach to determining "projected disposable income" often leads to results that are absurd or "demonstrably at odds with the intentions of its drafters," and the Supreme Court has ruled that such interpretations should be avoided if there are alternative interpretations that are consistent with the legislative intent. *Griffin*, 458 U.S. at 575. Thus, the non-presumptive starting point approach best reconciles the relevant Bankruptcy Code provisions and the intent of Congress based on two Supreme Court exceptions to the "plain meaning rule" and the power vested in the bankruptcy court as a court of equity under 11 U.S.C. § 105(a) to implement the provisions of the Bankruptcy Code.

Respectfully submitted,

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